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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

IN RE ROBERT C. HILLIARD,

Petitioner.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner presents the following questions:

1. Does the Due Process Clause of the United States Constitution protect an accused contemnor from being investigated, complained of, prosecuted, tried, and convicted by one judge, who then orders the contemnor to pay his court monetary sanctions?

2. Does the Due Process Clause of the United States Constitution protect an attorney accused of criminal contempt from being forced to choose between invoking his right not to testify against himself and his clients' privilege of confidential, attorney-client communications?

3. Does the Due Process Clause of the United States Constitution require evidence of both an *actus reus* and a *mens rea* to sustain a criminal conviction for out-of-court contempt?

4. Does the Due Process Clause of the United States Constitution require, in a criminal proceeding for out-of-court contempt, notice of whether the sanctions sought are "petty" or "serious"?

5. Does the Due Process Clause of the United States Constitution require, in a criminal proceeding for out-of-court contempt, notice of the amount of monetary sanction at issue?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert C. Hilliard ("Mr. Hilliard"), respectfully petitions the Supreme Court to issue a Writ of Certiorari to review the *per curiam* opinion of the Texas Supreme Court, which issued on March 13, 1998.

OPINION BELOW

Mr. Hilliard attaches the Texas Supreme Court's original opinion on petition for writ of mandamus as "Appendix A."[1]

JURISDICTION

Mr. Hilliard invokes this Court's certiorari jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mr. Hilliard bases this Petition for a Writ of Certiorari ("Petition") on the following constitutional provisions: United States Constitution, Amendments I, V, VII, and XIV; and 28 U.S.C § 1257. Mr. Hilliard attaches copies of these provisions (in relevant part) as "Appendix B."

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[1] The Texas Supreme Court's published opinion is *In re Max Bennett, Judge of the 319th Judicial District Court, Nueces County, Texas*, 960 S.W.2d 35 (1997) (*per curiam*).

STATEMENT OF THE CASE

A. Proceedings In The Trial Court.

1. Nueces County District Court Administration: The Clerk Randomly Assigns Cases.

a. The Clerk's Office Randomly Assigns Cases.

The trial court system of Nueces County, Texas, consists of eight different "district courts." (App. 2.) A different "district judge" administers and presides over each court. (App. 2.) When a litigant files a case in Nueces County, the local rules of district court administration and practice (the "Nueces County Local Rules") require that the office of the district clerk ("District Clerk") *randomly* assign the case to one of the eight district courts. (App. 19-20.)

b. Parties Can Seek Transfer Back To The Original Court.

If a litigant nonsuits and refiles the same case, both the Nueces County Local Rules and the Texas Rules of Civil Procedure provide that a party may move for the transfer of the case back to the original court. (App. 20-23 and 87-88.) The Nueces County Local Rules address and resolve the problem that arises when a party files a case and then dismisses it, only to refile it: Local Rule 3.1 vests the district courts of Nueces County with the authority to transfer the case to the original court (with the

original court's permission). (App. 20.)[2] In the absence of the original court's permission, the Nueces County "Administrative Judge" of the district courts has the overriding authority to reassign a case in this manner. (App. 20.)

The Texas Rules of Civil Procedure provide additional authority. Rule 330 states that:

> [When . . .] there are two or more district courts having civil jurisdiction, the judges of such courts may, in their discretion, exchange benches or districts from time to time, and may transfer cases and other proceedings from one court to another. . . . "

Tex. R. Civ. P. 330(e) (App. 88).[3]

c. Judges Can Seek Transfer Back To The Original Court.

Regardless of whether a party files a motion, the Texas Constitution, the Texas Government Code, and the Texas

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[2] *See also Republic Royalty Co. v. Alonso*, 931 S.W.2d 338, 342 (Tex. App. – Corpus Christi 1996, no writ) (citing Nueces County as having "local rules . . . [that] recognize the potential for abuse and provide generally for the transfer of cases to the court to which the first related lawsuit to be filed was assigned.").

[3] Rule 330 applies to all Nueces County district courts under Texas statutory law. *See Republic Royalty Co. v. Alonso*, 931 S.W.2d at 341-42 & nn., and *R.J. Gallagher Co. v. White*, 709 S.W.2d 379, 380 (Tex. App. – Houston [14th Dist.] 1986, no writ); *see also* § 24.012 (district court terms are continuous, with no days in between), § 74.092(b,c) (power to assign and transfer lies with district court clerks and administrative judges), § 74.094 (any judge may hear), and § 74.096 (district court terms are continuous).

Rules of Civil Procedure all authorize and empower *any* district court judge to transfer *any* case (in the same county or administrative region) either from or to her or his court. *R.J. Gallagher Co. v. White*, 709 S.W.2d 379, 380-81 (Tex. App. – Houston [14th Dist.] 1986, no writ) (holding that Rule 330 allows any judge to transfer any case); *see* Tex. Const. art. V, § 11, Texas Gov't Code Ann §§ 24.303 and 74.093 (Vernon 1988 & Supp. 1998).

d. No Rules Or Laws Penalize An Intent To Avoid The Effect Of The Random Filing System.

In enacting the Nueces County Local Rules, the district court judges *chose* to provide no sanction for a failure by the District Clerk to assign cases randomly. (*See* App. C *passim*.) Nor did they determine to provide any sanction for intending to avoid the random assignment effect of the rules. (*See* App. C *passim*.) Nor did the drafters of the Texas Constitution, nor did the promulgators of the Texas Rules of Civil Procedure, nor did the State Bar of Texas. In short, there is no constitutional or statutory law, no rule of practice or procedure, and no ethical directive addressing "forum-shopping" directly.[4] Rather, in Nueces County, the district court judges have chosen to provide an entirely different type of remedy for efforts to avoid

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[4] Petitioner relied, in part, upon a Harvard Law Review article on forum-shopping in determining whether he ethically and in good faith could file his cases as he did. (App. 59.) Apparently, Judge Bennett was unimpressed by the content and pedigree of this authority. *See* Michael A. Albert, Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 *passim* (1990).

random case distribution: transfer by reassignment to the original court. (App. 20-23.)

2. Mr. Hilliard Filed – And The District Clerk Assigned – All Cases At Issue Randomly.

Petitioner, Mr. Robert C. Hilliard ("Mr. Hilliard"), resides and works in Corpus Christi, Nueces County, Texas. In 1995 he represented several thousand Peruvians with potential toxic tort claims against a large number of defendants (the "Tort Defendants").[5] (App. 2-3.) Over the course of the two days before the *forum non conveniens* law of Texas changed (to the detriment of his clients), on August 30 and 31, 1995, Mr. Hilliard filed several different lawsuits, each with a single plaintiff, against the Tort Defendants, seeking monetary damages for alleged physical injuries. (App. 2-3.)

Mr. Hilliard filed in this manner to obtain a particular district court that he felt would provide an optimal venue for his clients' cases.[6] (App. 48-51.) For, as may be expected in any venue (state or federal), each judge, and

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[5] Mr. Hilliard represented the plaintiffs along with co-counsel, Andrew Schirrmeister, III. Mr. Schirrmeister participated in all proceedings, from the trial court through the Texas Supreme Court. Accordingly, many of the rulings and orders name Mr. Schirrmeister along with Mr. Hilliard. Because Mr. Hilliard files this Petition for a Writ of Certiorari ("Petition") individually – and for ease of reference – the Petition discusses only how the relevant actions and events affected him.

[6] Mr. Hilliard attaches a copy of the transcript of the hearing before Respondent, the Hon. Judge Max Bennett ("Judge Bennett"), as "Appendix D."

therefore each court, in Nueces County has a different reputation among the local trial attorneys. Indeed, this Court recognizes that judges are susceptible to differences and attorneys recognize such.[7] And as an active and experienced trial lawyer, Mr. Hilliard has differing views of the benefits and costs of litigating in each of the eight Nueces County district courts.

The differences between courts, whether in Nueces County or anywhere else, never dichotomize neatly into categories such as "plaintiff-oriented" or "defendant-oriented." Rather, the differences are subtle, ranging from a court's reputation for how long its cases spend on the docket, to its policies on mediation, to its facility with difficult evidentiary issues, to its familiarity with complex toxic tort cases – and so on and so on. (*See, e.g.*, App. 55-56 and 66-68 (Judge Bennett and witnesses discussing docket congestion and mass tort experience as potential reasons for why Mr. Hilliard may have chosen to file cases as he did).) All these factors play a part in any attorney's decision as to the prosecution or defense of his clients' cases. Mr. Hilliard's appraisal of the weight of these factors here was a tactical, attorney decision, subject to the privilege shared between his clients and himself. (App. 48-51.)

The District Clerk assigned the first of Mr. Hilliard's filings to the 319th Judicial District Court ("Judge Bennett's Court"). (App. 2.) The District Clerk assigned the

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[7] "Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir." *Bloom v. Illinois*, 391 U.S. 194, 202 n.4 (1968) (and cases cited therein).

next fifteen filings to various other Nueces County district courts, over which six different judges presided. (App. 101-03.)[8] The 17th filing, however, fell in a court that Mr. Hilliard considered optimal for his clients' cases: the 105th Judicial District Court, the Hon. Judge Manuel Bañales presiding ("Judge Bañales' Court"). (App. 103.) The legal community in Corpus Christi recognizes Judge Bañales as an experienced trier of large, mass tort cases – as Judge Bennett himself acknowledged (albeit indirectly). (*See* App. 55-56 and 66-68.)

Within a week, by September 5, 1995, Mr. Hilliard had non-suited the first sixteen cases. He then amended the petition he had filed in Judge Bañales' Court to include several hundred, similarly situated clients. (App. 3.) He did *not* amend the petition, however, to include the plaintiffs from the first sixteen filings.

3. Judge Bennett *Sua Sponte* Investigated Mr. Hilliard For Forum-Shopping.

On or before October 2, 1995, Judge Bennett learned through the courthouse grapevine that Mr. Hilliard had filed several cases until one fell in Judge Bañales' Court and then non-suited the rest – including the original filing in Judge Bennett's Court. (App. 101-03.) Evidently

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[8] The District Clerk assigned these cases as follows: 28th Judicial District Court – 4 cases; 94th Judicial District Court – 3 cases; 105th Judicial District Court (Judge Bañales' Court) – 1 case; 117th Judicial District Court – 2 cases; 148th Judicial District Court – 3 cases; 214th Judicial District Court – 2 cases; 319th Judicial District Court (Judge Bennett's court) – 1 case; and 347th Judicial District Court – 1 case.

personally offended, Judge Bennett initiated an investigation as to Mr. Hilliard's use of the Nueces County District Court filing system, concluding it was a "scheme" to wrest control of the filing system away from the District Clerk. (App. 104.)

As is clear from the rules attached hereto, as well as the undisputed facts, such a conclusion is absurd – at no time did Mr. Hilliard ever prevent the District Clerk from assigning *or re-assigning* any case to any court. Further, nothing he did ever prevented any Tort Defendant or any judge from moving to transfer any case to any court.

4. Judge Bennett Named Himself The Complainant Of Mr. Hilliard's Alleged Crime Of Forum-Shopping.

Judge Bennett nevertheless took it upon himself to issue a *sua sponte* order, on October 2, 1995 (the "Show Cause Order"), requiring Mr. Hilliard to appear before the court and explain why his filing of the first 16 cases was not sanctionable. Mr. Hilliard attaches a copy of the Show Cause Order as "Appendix E."

In the Show Cause Order, Judge Bennett stated that he had found that "there appears to be noncompliance with" a variety of laws and rules, both specified and unspecified. (App. 82.)[9] Judge Bennett thus ordered Mr. Hilliard to show cause:

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[9] Mr. Hilliard attaches copies of the Texas Rules of Civil Procedure (both those relevant here and those cited elsewhere in this Petition) and the Texas Constitution provisions (in relevant part) as "Appendix F."

> Why plaintiff's counsel, as an officer of the court, should not be sanctioned for intentionally violating the Rules of the Court and standing orders of the District Courts of Nueces County.

(App. 83.)[10] Because Judge Bennett did not complain that Mr. Hilliard had violated a pre-existing court order, at issue was criminal – and not civil – contempt. *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631 (1988) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)).

Notably absent from the Show Cause Order was the amount Judge Bennett intended to seek as a monetary penalty. Also absent was a reference to any rule or procedure Mr. Hilliard violated. All that was at issue were rules and procedures Judge Bennett believed Mr. Hilliard improperly may have wanted to avoid.

5. Judge Bennett Prosecuted Mr. Hilliard For Forum-Shopping.[11]

Mr. Hilliard objected, prior to the hearing, to the Show Cause Order on several grounds. He objected, in

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[10] As a procedural aside, Judge Bennett issued this order in a case in which Mr. Hilliard already had filed a Notice of Nonsuit. (App. 3.)

[11] Prior to the Show Cause hearing, on October 16, 1995, and forum-shopping on their own, the Tort Defendants removed the matter to federal court. (App. 4.) The various parties to the appeals in this proceeding thus have argued over whether Judge Bennett had jurisdiction to enter *any* order in a case in which (i) the plaintiff had filed a nonsuit and (ii) the Tort Defendants had removed to federal court. (App. 6-11.) The Supreme Court of Texas ruled that Judge Bennett *did* have jurisdiction in both instances. (App. 6-11.) Mr. Hilliard does not dispute either of these portions of the Texas Supreme Court's decision.

particular, to Judge Bennett's: (i) lack of jurisdiction; (ii) violation of federal, constitution rights (due process); (iii) failure to give proper notice; and (iv) lack of authority to sanction, under the circumstances. Mr. Hilliard attaches a copy of his Reply of Plaintiff's Attorneys to Sua Sponte Order ("Reply to Show Cause Order") as "Appendix G."

No one disputed at the hearing that Mr. Hilliard filed, nonsuited, and amended his cases in accordance with the Nueces County Local Rules. An employee of the District Clerk's office, Carolyn Spanutius, testified that Mr. Hilliard had filed the first case in Judge Bennett's Court, the next fifteen in various Nueces County District Courts, and the last case in Judge Bañales' Court. (App. 38-41.) She testified further that he paid the filing fee for each case (App. 45-46 and 71), and non-suited the first 16 cases in accordance with the Nueces County Local Rules (App. 45). In short, Ms. Spanutius testified that all procedures occurred in proper order:

> Judge Bennett: Is [the filing] system a random-filing system, that is, *one in which a filing attorney cannot select a court for his case?*
>
> Clerk Spanutius: Yes, your honor, it is random draw.

(App. 44 (emphasis added).)

Likewise, Mr. Hilliard admitted to filing the 17 lawsuits, non-suiting the first 16 lawsuits, and to amending the 17th lawsuit to include the vast bulk of his clients. (App. 48-49 and 54-55.) Thus, both Mr. Hilliard and Clerk Spanutius provided the only testimony about the filing of

the lawsuits and both agreed that the District Clerk's office solely was responsible for the random filing of the 17 lawsuits.

Judge Bennett's case focused, instead, only on Mr. Hilliard's intent in filing the first 16 lawsuits. (App. 49.) Overruling Mr. Hilliard's objection that, as this was a criminal proceeding, he ought not be forced to testify against himself (App. 47-48), Judge Bennett demanded to know, "And did you cause those lawsuits to be filed in such a manner that you and only you, your co-counsel, and/or your plaintiffs attempted to select the judge and/or court that your litigation would be tried in?" (App. 49.) Mr. Hilliard responded, "I did not." (App. 49.) He testified further that he was aware of the Nueces County Local Rules, the Texas Rules of Civil Procedure, and the ethical objectives of these rules (App. 49-50), and that, "I can tell you that it was not my intention to affect the impartiality [of the judicial system] at all." (App. 50.)

Judge Bennett grilled Mr. Hilliard extensively on why he filed the 17 cases in the manner he did, why he nonsuited the first 16, how serious he was in prosecuting the first 16 plaintiffs' cases, how much money he intended to spend on these cases, and his general strategy in handling these cases. (App. 49-58.) Aside from what Mr. Hilliard already had told the media – namely, that he filed in this manner in order to land one of his cases in a particular court, before a particular judge – he asserted the attorney-client privilege as to Judge Bennett's questions (asked, as they were, before opposing counsel). (App. 49-58.) He did explain, however, that Judge Bennett need not have taken personal offense:

> As I told the court when I was testifying, it's not an easy thing – I know, if I go back to 13 years, I can remember specific cases that I've tried in front of you to a verdict, over half a dozen that I even thought of, and in every single one of those cases there was nothing but impartiality on your behalf. This is not about you.

(App. 76.)

When Judge Bennett asked Mr. Hilliard, "As an officer of the court do you feel any obligation whatsoever to comply with the spirit of the Texas Rules of Civil Procedure?", he responded:

> As an officer of a court I feel my paramount obligation is to the children of Peru who are sick and some dead as a result of the defendants' actions. As an officer of the court, I also feel that if the rules of procedure are followed then they are followed; if they are not followed, then they are not followed. I don't believe that the procedure is subject to spirit. It's either followed or not, and I believe they were followed here, Your Honor.

(App. 51.)

6. Judge Bennett Tried And Convicted Mr. Hilliard For Forum-Shopping.

Notwithstanding the undisputed testimony, which proved that Mr. Hilliard followed – and did not contravene – any rules of practice or procedure, Judge Bennett found Mr. Hilliard guilty of criminal contempt. Judge Bennett so found because he disapproved of what he

perceived to be Mr. Hilliard's intent. Judge Bennett determined to sanction Mr. Hilliard monetarily as punishment for this "wrongful" intent.

Both Mr. Hilliard and Mr. Brown tried desperately to ascertain what amount of monetary sanctions Judge Bennett was considering. (App. 56-58.) Judge Bennett refused to tell either of them. (App. 58.)

On January 4, 1998, Judge Bennett entered his Order on Sanction of Attorneys ("Sanction Order"). Mr. Hilliard attaches a copy of the Sanction Order as "Exhibit H." In the Sanction Order, Judge Bennett *specifically found* that the District Clerk randomly assigned Mr. Hilliard's 17 cases. (App. 100.) Judge Bennett nevertheless further found that Mr. Hilliard "knowingly and intentionally" violated the Nueces County Local Rules and the Texas Rules of Civil Procedure. (App. 104-05.)[12]

7. Judge Bennett Awarded His Court $ 10,000 For Mr. Hilliard's Forum-Shopping Conviction.

Judge Bennett determined that a monetary penalty was the appropriate sanction for Mr. Hilliard's wrongful intent in filing the 16 cases. And, notwithstanding the fact that Judge Bennett was the complainant, he awarded his court $ 10,000 of Mr. Hilliard's money. (App. 106.)

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[12] NB: Although Judge Bennett's Show Cause Order did *not* reference Texas Rule of Civil Procedure 13, the Sanction Order relies upon it. (*Compare* App. 80-81 *with* App. 105.)

B. The Court Of Appeals Vacated Judge Bennett's Sanction Order, Holding One Person *Cannot* Sit As Investigator, Complainant, Prosecutor, Judge, And Beneficiary Of Award.

In response to Mr. Hilliard's petition for mandamus relief, on June 13, 1996, the Thirteenth Court of Appeals (the "Court of Appeals") entered a decision, directing Judge Bennett to vacate the Sanctions Order. Mr. Hilliard attaches a copy of his Petition for a Writ of Mandamus to the Thirteenth (Corpus Christi) Court of Appeals, as well as the Court of Appeals' Opinion, as "Appendix I" and "Appendix J," respectively.[13] The Court of Appeals' holding was twofold. First, it held that Judge Bennett had "lost jurisdiction" to consider the sanctions issue. (App. 136-37.) Mr. Hilliard does not petition this Court to review this aspect of his case.

Second, the Court of Appeals held that Judge Bennett's conduct constituted a violation of due process, under the United States Constitution. (App. 138-40.) It held that Judge Bennett "did not have the authority to be both accuser and adversary to the relators on the one hand, while remaining the ultimate judge of their conduct on the other." (App. 138.)

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[13] The Court of Appeals' published decision is *In re Max Bennett, Judge of the 319th Judicial District Court, Nueces County, Texas*, 925 S.W.2d 338 (Tex. App. – Corpus Christi 1998, orig. proceeding). After Mr. Hilliard filed his mandamus petition, Judge Bennett – who did not file a response – filed "Additional Findings of Fact." Mr. Hilliard attaches a copy of the Additional Findings of Fact as "Appendix K."

C. The Supreme Court Vacated The Court Of Appeals' Decision, Holding One Person *Can* Sit As Investigator, Complainant, Prosecutor, Judge, And Beneficiary Of Award.

On June 28, 1996, Judge Bennett filed a petition for mandamus relief against the Court of Appeals in the Supreme Court of Texas.[14] On December 4, 1997, the Supreme Court granted Judge Bennett's motion and – without oral argument – simultaneously entered a *per curiam* decision, vacating the Court of Appeals' decision to vacate the Sanctions Order. (App. A *passim.*)[15]

The Texas Supreme Court's hastily issued, peculiar, *per curiam* decision wholly failed to address the due process implications of Judge Bennett's conduct. As to these issues, the Texas Supreme Court wrote (in relevant part):

> The power to sanction is of course limited by the due process clause of the United States Constitution, as urged by plaintiffs' counsel. The lawyers sanctioned in this case cannot deny that they were fully aware of the purposes of the random assignment system. They intentionally attempted to circumvent those purposes. Counsel were given notice of the court's intention to consider sanctions and were given an opportunity to respond. Due process was not violated

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[14] Mr. Hilliard attaches a copy of the letter from the Texas Supreme Court reflecting the date of Judge Bennett's filing of a petition for a writ of mandamus as "Appendix L."

[15] Mr. Hilliard attaches a copy of the letter from the Texas Supreme Court reflecting the date of its granting of Judge Bennett's petition, issuance of the writ, and *per curiam* decision on mandamus as "Appendix M."

> in this case. The court of appeals abused its discretion in directing Judge Bennett to vacate the order sanctioning counsel in this case.

(App. 12-13 (citations and footnote omitted, emphasis added).) The above-quoted language reflects the entirety of the Texas Supreme Court's analysis of the constitutionality and propriety of Judge Bennett's actions.

The Court of Appeals' due process analysis certainly was not "dicta," the Texas Supreme Court's opinion notwithstanding. Mr. Hilliard fully briefed these issues in his petition for a writ of mandamus to both Judge Bennett and the Court of Appeals. (App. 91-97 and 119-31.)[16]

Mr. Hilliard timely moved for rehearing on December 19, 1997. (App. 149.)[17] The Texas Supreme Court denied Mr. Hilliard's rehearing motion on March 13, 1998. (App. 161.)[18]

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[16] If the Texas Supreme Court's contention that the language in the Court of Appeals' opinion was *dicta* because Mr. Hilliard did not raise precisely that argument in precisely those terms, its conclusion is still incorrect: a party is not barred by failure to cite below the proper constitutional provisions when the lower courts consider the relevant provisions. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 217 n.3 (1968) (and cases cited therein).

[17] Mr. Hilliard attaches a copy of Mr. Hilliard's Motion for Rehearing to the Texas Supreme Court as "Appendix N."

[18] Mr. Hilliard attaches a copy of the letter from the Texas Supreme Court denying Mr. Hilliard's Motion for Rehearing as "Appendix O."

D. This Court Has Jurisdiction.

The Texas Supreme Court denied Mr. Hilliard's rehearing motion on March 13, 1998. Mr. Hilliard files this Petition within 90 days thereafter. The Petition, accordingly, is timely. *See* 28 U.S.C. § 2101(c) and Sup. Ct. R. 13. Because Mr. Hilliard asserts the violation of rights granted to him by the United States Constitution, jurisdiction for review by certiorari lies under 28 U.S.C. § 1257(a). Mr. Hilliard has preserved error on the issues raised herein. (App. 91-97 and 119-31.)

REASONS FOR GRANTING THE WRIT

A. Standards of Review and Levels of Constitutional Analysis.

1. Standards of Review.

a. Legal Issues.

As to legal issues, the Court reviews challenges to the constitutionality of a federal statute *de novo*, including due process challenges. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 405 (1990), *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631-35 (1988) (hereinafter "*Hicks v. Feiock*"), and *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982).

b. Factual Issues.

As to factual issues, the law imposes the evidentiary standard of "beyond reasonable doubt" for criminal contempt proceedings. *See, e.g., Hicks v. Feiock*, 485 U.S. 624,

637-38 (1988), *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 798-801 (1987) (hereinafter "*Young v. United States*"), and *Bloom v. Illinois*, 391 U.S. 194, 205 (1968).[19]

2. Levels of Constitutional Analysis.

The pertinent facts are these: (1) Judge Bennett accused Mr. Hilliard of criminal – not civil – contempt;[20] (2) occurring outside the court's presence;[21] and (3) in the form of *intent* and not *conduct*.[22] Overarching all of these facts are two, considerable shadows. First rises the specter of Judge Bennett's service as investigator, complainant, prosecutor, trier of fact, convictor, and recipient of award. Second looms Mr. Hilliard's duty to preserve attorney-client confidences. The appropriate standard of

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[19] As to the appropriate level of review *this* Court should apply when analyzing Judge Bennett's factual determinations, Mr. Hilliard respectfully submits that the "close scrutiny" standard discussed – and rejected – in *Anderson v. City of Bessemer City*, 470 U.S. 564, 571-73 (1985), is appropriate here. Regardless, however, of whether the Court applies the "close scrutiny" or "clearly erroneous" standard of factual review, however, the record reflects constitutional error. *See id.* (discussing two standards and their applicability); *cf. Ferguson v. Skrupa*, 372 U.S. 726, 732-33 & n.15 (1963) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955)) (only "invidious" discrimination offends the Constitution).

[20] *See Hicks v. Feiock*, 485 U.S. 624, 631-35 & nn. (1988), and *Young v. United States*, 481 U.S. 787, 798-800 (1987) & nn.; *see also Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-45 (1911).

[21] *See Groppi v. Leslie*, 404 U.S. 496, 504-05 & n.8 (1972), and *Sacher v. United States*, 343 U.S. 1, 9-11 (1952).

[22] *Cf. In re Ruffalo*, 390 U.S. 544 *passim* (1968).

review must take into account these facts and considerations.

Mr. Hilliard respectfully submits that, when a court proposes to sanction an attorney, whose acts are legal, but whose intent the court believes to be wrongful, and the attorney cannot testify in his self-defense without potentially compromising his clients' rights, the attorney and his clients' First, Fifth, and Fourteenth Amendment rights are at stake (namely, the rights to association and due process of law). The attorney-client privilege, as well as the duty to represent one's client zealously, arose here to silence Mr. Hilliard from testifying in his own defense as to why he chose certain tactics over others. Judge Bennett's cross-examination of Mr. Hilliard in front of opposing counsel only worsened the dilemma. (App. D *passim*.) Accordingly, the appropriate standard of review should be one of heightened or "close" scrutiny.

Further support for this conclusion arises when one considers the underpinnings of the doctrine of "separation of powers." James Madison observed, "[The] accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 300 (H. Lodge ed., 1888). While the "separation of powers" provision of the United States Constitution is not mandatory upon the states, the principles it reflects certainly inform the question of whether a "fundamental right" is at issue here. *See Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980) (and cases cited therein), and *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 & n.13 (1974).

Judge Bennett assumed executive (investigatory, prosecutorial), judicial (trier of fact, judge), and legislative (determining an intent to be improper when the conduct at issue was within rules of practice and statutory law) roles. He even participated as a private individual (complainant and beneficiary of award). And, while wearing all these hats, he adjudicated not a wrongful act committed in his presence, but a purportedly wrongful belief held outside his presence.

One judge, sitting as his own personal "star chamber," cannot use his judicial powers to persecute an attorney – and therefore his clients – for wrongful intent. Accordingly, Mr. Hilliard urges this Court to apply here a constitutional analysis based upon "strict scrutiny." Analogous precedent exists to support such an application of strict scrutiny: *see, e.g., Youngberg v. Romeo*, 457 U.S. 307, 315-18 (1982) (protecting mentally retarded individual from "arbitrary governmental action" because government held complete control over his well-being (quoting *Greenholtz v. Inmates of the Nebraska Penal & Correction Complex*, 442 U.S. 1, 18 (1979)), *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-61 (1958), and *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 250-51 (1957).

B. Substantive Due Process Requires The Adjudicator Of An Out-Of-Court, Serious Contempt Be Someone Other Than The Investigator, Complainant, Prosecutor, And Beneficiary Of Award.

Contempt proceedings – whether state or federal – must comply with constitutional due process requirements. *Hicks v. Feiock*, 485 U.S. 624, 631-32 (1988), and

Mayberry v. Pennsylvania, 400 U.S. 455, 464-66 (1974). Paramount among due process considerations is the rule that, "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The requirement of neutrality has been jealously guarded by this Court."). The concern at issue is the "long recognized [ ] potential for abuse in exercising the summary power to imprison for contempt – it is an "arbitrary" power which is "liable to abuse." *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

1. Judge Bennett Should Not Have Been The Investigator And Adjudicator.

The individual who investigates the facts of a criminal charge constitutionally cannot serve as the adjudicator, too. *See, e.g., Young v. United States*, 481 U.S. 787 *passim* (1987) (although focusing on an interested *prosecutor, Young* bases much of its rationale on prosecutors' investigatory powers and observes, "The misuse of those methods 'would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of those powers.' " (citation omitted)), and *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972) (holding that in parole revocation proceedings, "due process requires that [the decision-maker be] someone not directly involved in the case"); *see also In re Murchison*, 349 U.S. 133, 135-38 (1955), and *In re Oliver*, 333 U.S. 257 *passim* (1948).

2. Judge Bennett Should Not Have Been The Complainant And Adjudicator.

Though short of personal attack, contemptuous conduct "may still provoke a trial judge and so embroil him in controversy that he cannot 'hold the balance nice, clear and true between the State and the accused.' " *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). For this very reason, when a judge is a complainant in a criminal contempt proceeding, he cannot also sit as judge. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247 (1980) (no due process violation when administrator serves as prosecutor or "civil plaintiff" and not judge), *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-67 (1971), and *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445-49 (1911); *see also In re Murchison*, 349 U.S. 133, 135-38 (1955) (holding unconstitutional a proceeding in which the judge sat as a one-person grand jury, charged a witness with contempt, and adjudicated the contempt charge).

The inquiry "is not only whether there was actual bias on respondent's part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interest of the court and the interests of the accused'. . . . 'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less." *Taylor v. Hayes*, 418 U.S. at 501 (citations omitted).

3. Judge Bennett Should Not Have Been The Prosecutor And Adjudicator.

Rejecting the argument that an interested party can serve as prosecutor in a contempt hearing, the Court observed in *Young v. United States*, 481 U.S. 787 (1987):

> It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion. . . . We have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty. . . . [A]ppointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.

Id. at 810. The Court expressly concluded that "the appointment of an interested prosecutor" is an error "so fundamental and pervasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case." *Id.* at 814.

Now, granted, the "interest" of the prosecutor in *Young* is different from any interest Judge Bennett may have had. Nevertheless, his intertwinement in all aspects of this proceeding left him too involved to be uninterested. And the Court has noted that "a personal interest, financial *or otherwise*" injected into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) (emphasis added); *see also*

Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978), and *Marshall v. Jerrico, Inc.*, 446 U.S. at 247 (because the conduct at issue was of a prosecutor – and not a judge – it passed constitutional muster).

4. Judge Bennett Should Not Have Been The Beneficiary And Adjudicator.

It is all very well and good to say that Judge Bennett awarded his court – and not himself – the $10,000, but such an argument raises form over substance. Judge Bennett and his court are paid by the taxpayers. Neither the county nor the state nor Judge Bennett has allocated funds such as the award against Mr. Hilliard to be a part of the court's budget. Judge Bennett did not award these monies to a party for its costs or expenses, or inconvenience. Nor did Judge Bennett award these monies to compensate his court for its costs or expenses or inconvenience. Judge Bennett awarded an arbitrary and extraordinary amount to his court, which he – in his sole discretion – can spend any way he wants (presumably that is consistent with state law).

In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), this Court held unconstitutional a system of fines provided by adjudications, when the adjudicators were responsible for city finances. In *Ward*, Ohio state law authorized mayors to sit as judges in cases of ordinance violations and certain traffic violations. *Id.* at 57. The fines, forfeitures, costs, and fees imposed by these mayors, in turn, financed a major part of village income. *Id.* at 58-59. "The issue turned . . . on whether the Mayor [could] be regarded as an impartial judge." *Id.* at 59.

The Court in *Ward* explicitly rejected the Ohio Supreme Court's conclusion that the fact that "the revenue produced from a mayor's court provides a substantial portion of a municipality's funds . . . does not mean that a mayor's impartiality is so diminished thereby that he cannot act in a disinterested fashion in a judicial capacity." *Id.* at 58-59. By the same token, here, the mere fact that Judge Bennett awarded himself fees with his judge's hat on does not mean that we must all pretend that he had no interest in the award and derived no benefit therefrom. "[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 59-60 (quoting *Tumey v. Ohio,* 273 U.S. 510, 523 (1927)).

5. Judge Bennett Should Not Have Been The Adjudicator.

"A litigant [. . .] is entitled to a neutral and detached judge in the first instance." *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 248 n.9 (quoting *Ward v. Village of Monroeville,* 409 U.S. 57, 61-62 (1972)). Mr. Hilliard obviously did not enjoy a "neutral and detached" Judge Bennett.

> [T]he notion of judges in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth much more vividly than *Anderson [v. Dunn,* 19 U.S. (6 Wheat.) 204 (1821)] could ever have imagined the prospect of "the most tyrannical licentiousness."

Id. at 2145 (Scalia, J., concurring (quoting *Anderson v. Dunn*, 19 U.S. at 227-28)).

The Due Process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Thus, it is impermissible for a court to act as prosecutor, fact-finder, and judge. *See American Airlines, Inc. v. Allied Pilots Ass'n*, 968 F.2d 523, 531 (5th Cir. 1992).

Clearly, Judge Bennett took personally the fact that Mr. Hilliard filed 16 cases after the first case, which the District Clerk randomly assigned to his court. This reason, in and of itself, is sufficient to undermine any confidence in Judge Bennett's Sanction Order. "Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the juridical process or with the duties of the officers of the court." *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

This case demonstrates "the unwisdom of vesting the judiciary with completely untrammeled power to punish contempt, and makes clear the need for effective safeguards against that power's abuse." *Bloom v. Illinois*, 391 U.S. at 207.

C. Procedural Due Process Of Law Requires That "Adequate Notice" Include Notice That The Contempt At Issue Is "Serious" And Of The Law Violated, As Opposed To Notice Of A Law Obeyed, But With Alleged Wrongful Intent.

Procedural due process rules are meant to protect persons from the mistaken or unjustified deprivation of life, liberty, or property. *Carey v. Piphus*, 435 U.S. 247, 259 (1978). "The risk inherent in the truth-finding process" informs and shapes these rules. *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976)). They are especially relevant in contempt proceedings because of the "heightened potential for abuse." *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

1. Due Process Protected Mr. Hilliard From Having To Testify Against Himself.

Mr. Hilliard objected to Judge Bennett's ordering him to testify against himself; Judge Bennett overruled this objection. (App. 47-48.) This, in and of itself, is reversible, constitutional error. *See, e.g., Young v. United States*, 481 U.S. 787, 798-99 (1987). Compounding the gravity of the situation, Judge Bennett then demanded that Mr. Hilliard testify, in front of opposing counsel, in violation of the attorney-client privilege, which Mr. Hilliard declined to do. As a result of his failure to explain why he nonsuited the first 16 cases, both Judge Bennett and the Texas Supreme Court presumed that his intent was wrongful.

(App. 12-13 ("filing multiple cases without intent to prosecute") and App. 104-06.) This constitutionally impermissible presumption cannot be used to satisfy the "beyond reasonable doubt" evidentiary standard applicable here.

2. Due Process Protected Mr. Hilliard's Right To Know The Amount In Sanctions At Issue.

Due process in the context of an out-of-court contempt proceeding requires "reasonable" or "adequate" notice. *See, e.g., Groppi v. Leslie*, 404 U.S. 496, 502-03 (1972) ("reasonable"), and *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) ("adequate"). The notice at issue here is constitutionally deficient in two respects. First, Judge Bennett complained in his Show Cause Order that Mr. Hilliard violated certain of Nueces County Local Rules, the Texas Rules of Civil Procedure, and the Texas and United States Constitutions. Yet the facts, as depicted by Judge Bennett, reflected compliance with these rules, not violation. Indeed, the parties dispute only whether Mr. Hilliard's intent violated these rules. Such notice is constitutionally deficient in and of itself.

Second, the notice is deficient because Judge Bennett failed to apprise whether the contempt at issue was "petty" or "serious." *Muñiz v. Hoffman*, 422 U.S. 454, 475-77 (1975), and *Bloom v. Illinois*, 391 U.S. 194, 196-98 (1968) ("criminal contempt is a petty offense unless the punishment makes it a serious one. . . . "). When Mr. Hilliard specifically asked what amount in sanctions was at issue, Judge Bennett refused to tell him. (App. 58.) This, too, is clear constitutional error. *See, e.g., Taylor v. Hayes*, 418 U.S. 488, 497-503 (1974). Had Mr. Hilliard

known $10,000.00 was at issue, he could have sought a jury. *See, e.g., Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 218-19 (1968), and *Bloom v. Illinois*, 391 U.S. at 202; *see also* U.S. Const. amend. VII.

3. Due Process Requires Adequate Notice In The Form Of Allegations of An *Actus Reus*, As Well As A *Mens Rea*.

Criminal jurisprudence historically has required both an *actus reus* and a *mens rea* as necessary elements of an offense. *See United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) (Brennan, J., concurring). Typically, battles are fought over whether an act alone – in the absence of an evil intent – can sustain a conviction. Here, however, stands the odd case: an evil intent but no bad act.[23] Given those facts, Mr. Hilliard respectfully submits that the notice at issue was constitutionally deficient. *Cf. In re Ruffalo*, 390 U.S. 544 *passim* (1968), and *Holt v. Virginia*, 381 U.S. 131 *passim* (1965). Due Process requires that Mr. Hilliard know not only "the nature of the charge against him, but [ ] know that it is a charge, and not a suit."

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[23] Justice Brennan, in his concurrence in *Apfelbaum*, quoted the following lines from Shakespeare as apropos:

> His acts did not o'ertake his bad intent;
> And must be buried but as an intent
> That perish'd by the way: thoughts are no subjects,
> Intents but mere thoughts.

Id. (quoting William Shakespeare, *Measure for Measure*, act 5, sc. 1 (cited in Glanville Williams, *Criminal Law: The General Part* 17 (2d ed. 1961)).

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 446 (1911).

CONCLUSION

For the reasons argued above, and given the unique circumstances and facts of this case, Petitioner, Robert C. Hilliard, respectfully urges the Court to grant a writ of certiorari to the Texas Supreme Court. The Due Process Clause of the United States Constitution demands no less.

Respectfully submitted,

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APPENDIX A

In Re Max BENNETT, Judge of the 319th Judicial District Court, Nueces County, Texas, Relator.

No. 96-0598.

Supreme Court of Texas.

Dec. 4, 1997.

Rehearing Overruled March 13, 1998.

Carlos Villarreal, Corpus Christi, for Relator.

Eric Brown, Austin, Linda C. Breck, Corpus Christi, for Respondent.

OPINION

PER CURIAM.

In this mandamus proceeding we hold that neither the filing of a nonsuit nor the subsequent removal of a case to federal court deprived the state court of jurisdiction to consider, *sua sponte*, whether sanctions should be imposed on attorneys for pre-removal conduct when the sanctions are unrelated to the merits of the removed case. We further hold that the trial court did not abuse its discretion in imposing sanctions under the facts of this case. Accordingly, we conditionally issue a writ of mandamus directing the court of appeals to vacate the writ of mandamus in which it ordered the trial court to vacate sanctions, 925 S.W.2d 338.

I

This case arises out of a deliberate circumvention of the random assignment of cases in a county in which

eight district courts preside. The attorneys who were sanctioned by the Honorable Max Bennett of the 319th District Court of Nueces County for their conduct are Robert C. Hilliard and Andrew Schirrmeister, III. They represent approximately seven hundred Peruvian plaintiffs who claim to have been injured by toxic gases and chemicals released by the Southern Peru Copper Corporation.

On August 30, 1995,[1] plaintiffs' counsel filed the first of seventeen lawsuits in Nueces County. The first suit was brought on behalf of three claimants. In accordance with the local rules of Nueces County, the case was randomly assigned to Judge Bennett's court.[2] Plaintiffs' counsel then filed sixteen more lawsuits, each having no more than five plaintiffs. The petitions were filed one after the other, only minutes apart, late in the afternoon of August 30 and on the morning of August 31, 1995. Each suit named different plaintiffs, all citizens of Peru, but the same defendants were sued in every case, and

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[1] As a historical note, amendments to the *forum non conveniens* statute enacted by the 74th Legislature went into effect on September 1, 1995, and applied to all cases filed on or after that date. *See* TEX. CIV. PRAC. & REM.CODE § 71.051 historical note [Act of May 24, 1995, 74th Leg., R.S., ch. 567, § 2, 1995 Tex. Gen. Laws 3363, 3364].

[2] Rule 3 of the Local Rules of the District Courts of Nueces County (Dec. 6, 1988) and the Substitute Order on Assigning Criminal and Civil Cases in the District Courts of Nueces County (Nov. 19, 1992) both provide that the district clerk of Nueces County shall randomly assign cases to the district courts of the county. The 105th District Court, however, is to receive one half the share of civil case assignments received by other district courts.

each petition contained identical factual allegations and legal claims. Each case was randomly assigned to one of the eight district courts in the county, but plaintiffs' counsel instructed the clerk of the court not to prepare citation for service in any of the first sixteen cases that had been filed.

None of the first sixteen suits was assigned to the 105th District Court. But the seventeenth was. Two hours after that assignment, plaintiffs' counsel filed an amended petition in the 105th District Court adding approximately seven hundred plaintiffs, though none of the claimants in the other sixteen suits were ever joined. Once counsel for plaintiffs had finally succeeded in lodging a case in the 105th District Court, they instructed the clerk of the court to issue citation for service on the defendants. Service was never requested in any of the sixteen other suits.

On September 5, 1995, five days after securing the 105th District Court as the forum of choice, plaintiffs' counsel filed notices of nonsuit in all sixteen previously filed suits pursuant to TEX.R. CIV. P. 162.[3] Judge Bennett apparently was skeptical of this turn of events. He did not sign an order of nonsuit in the case pending in his court, but instead, on October 2, 1995, signed a "Sua Sponte Order Abating Dismissal and Setting Hearing on Transfer, Consolidation and Sanctions." The order required plaintiffs' counsel to appear on November 10,

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[3] Rule 162 provides in part: "At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit. . . ." TEX.R. CIV. P. 162.

1995 to show cause why the other sixteen lawsuits should not be transferred and consolidated into the case before Judge Bennett and why plaintiffs' counsel should not be sanctioned for intentionally violating local rules implementing random assignment of cases in Nueces County or the Texas Rules of Civil Procedure, including Rules 1, 2, 3a, 41, and 174.

Prior to the hearing on sanctions before Judge Bennett, the defendants removed all seventeen cases to federal court, including the case pending before Judge Bennett. Shortly after removal, plaintiffs' counsel filed with the federal district court a "Notice of Prior Filing of Nonsuit, and, in the Alternative, Notice of Dismissal pursuant to FRCP 41(a)(1)."[4]

Judge Bennett nevertheless went forward with a hearing on the matter of sanctions on November 10, as scheduled. At that hearing, counsel for the plaintiffs were themselves represented by counsel and were given the opportunity to call witnesses. Plaintiffs' counsel asserted that they acted in good faith and intended to diligently prosecute the case remaining in the 105th District Court. Hilliard admitted, however, that the filing process he

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[4] FED.R.CIV.P. 41(a)(1) is the federal analogue to Tex.R. Civ. P. 162 and provides:

> **RULE 41. DISMISSAL OF ACTIONS**
>
> **(a) Voluntary Dismissal: Effect Thereof.**
>
> (1) *By Plaintiff; By Stipulation.* . . . [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . .

used was designed to get his clients' claims before a particular judge. At the close of the hearing, Judge Bennett announced from the bench that he intended to enter an order requiring plaintiffs' counsel each to pay $10,000 as a sanction.

Meanwhile, on November 16, 1995, before Judge Bennett had reduced his rulings to a written order, the federal district court consolidated all seventeen cases that had been removed. That same day, the federal district court dismissed, but did not remand, all the cases that had been nonsuited, including the one removed from Judge Bennett's court, leaving pending only the case removed from the 105th District Court. (The federal district court eventually entered final judgment in the case removed from the 105th District Court on January 22, 1996, dismissing the case under the doctrines of comity of nations and *forum non conveniens*. The United States Court of Appeals for the Fifth Judicial Circuit has affirmed that judgment. *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir.1997).)

In January 1996, Judge Bennett proceeded to memorialize his rulings from the sanctions hearing in formal written orders. Among the express findings included in those orders, Judge Bennett found that counsel had knowingly and intentionally violated the Local Rules of Practice of the District Courts of Nueces County that provide for the random assignment of cases and had violated the Texas Rules of Civil Procedure, in particular Rules 13 and 1. Judge Bennett never signed an order dismissing the case pursuant to the notice of nonsuit.

Plaintiffs' counsel filed a motion for leave to file a petition for writ of mandamus in the court of appeals challenging Judge Bennett's sanctions. The court of appeals conditionally issued a writ of mandamus directing Judge Bennett to vacate that order and to sign an order dismissing the case pursuant to the notice of nonsuit.

Judge Bennett has now instituted this mandamus proceeding and requests that this Court issue a writ directing the court of appeals to vacate its writ of mandamus. We first consider the extent of Judge Bennett's authority to sanction counsel after the notice of nonsuit was filed.

II

The court of appeals held that because no affirmative relief had been requested by any defendant, the filing of a nonsuit deprived the trial court of jurisdiction to take any action other than the ministerial act of signing an order dismissing the case. 925 S.W.2d at 341. That holding gives an inordinate amount of weight to a notice of nonsuit and strips a trial court of authority to sanction the conduct of counsel when appropriate.

Generally, plaintiffs have the right under TEX.R. CIV. P. 162 to take a nonsuit at any time until they have introduced all evidence other than rebuttal evidence. *See Hyundai Motor Co. v. Alvarado,* 892 S.W.2d 853, 854 (Tex. 1995); *Aetna Cas. & Sur. Co. v. Specia,* 849 S.W.2d 805, 806 (Tex.1993). Such a nonsuit may have the effect of vitiating earlier interlocutory orders and of precluding further action by the trial court, with some notable exceptions.

See Hyundai, 892 S.W.2d at 854-55 (holding that once a trial court announces a decision on a motion for partial summary judgment, that claim is no longer subject to the plaintiff's right to nonsuit); *Greenberg v. Brookshire*, 640 S.W.2d 870, 872 (Tex.1982) (stating that the rule recognizing a plaintiff's right to nonsuit should not be confused with the rule recognizing the power of a court to grant injunctive relief to prevent a multiplicity of groundless suits).

However, the signing of an order dismissing a case, not the filing of a notice of nonsuit, is the starting point for determining when a trial court's plenary power expires. Appellate timetables do not run from the date a nonsuit is filed, but rather from the date the trial court signs an order of dismissal. *See Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex.1995) ("The appellate timetable does not commence to run other than by a signed, written order, even when the signing of such an order is purely ministerial."); *see also Shadowbrook Apartments v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex.1990); TEX.R. CIV. P. 329b(d).

While we have recognized that generally, a trial court has no discretion to refuse to sign an order of dismissal once notice of a nonsuit has been filed, this broad principle necessarily has exceptions. Rule 162 expressly states that a dismissal under the rule "shall have no effect on any motion for sanctions, attorney's fees or other costs pending at the time of dismissal." TEX.R. CIV. P. 162. Further, a trial court is free to "impose [ ] sanctions while it retain[s] plenary jurisdiction" even when a motion for sanctions is filed after the notice of nonsuit is filed. *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596

(Tex.1996). It is only after plenary jurisdiction has expired that a trial court may not sanction counsel for pre-judgment conduct. *Id.* at 596 & n. 2; *see also BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840 (Tex.1990) (right to nonsuit is absolute unless there is a pending claim for affirmative relief or a motion for sanctions).

The removal to federal court placed this case in an unusual procedural posture. On the date of removal, Judge Bennett had not signed an order of dismissal, but he would have been well within his authority to defer signing such an order pending the disposition of the sanctions issues. A trial court has the discretion to allow a reasonable amount of time for holding a hearing on sanctions and, once the question of sanctions has been resolved, to then sign an order of dismissal. The court of appeals erred when it held otherwise. Judge Bennett would have had plenary power when he signed the order imposing sanctions but for the removal.

The opinion of the court of appeals is devoid of any mention of removal and erroneously focused only on Judge Bennett's plenary power in the context of a nonsuit. The court of appeals should have considered what authority Judge Bennett had to enter an order sanctioning counsel for pre-removal conduct after the case had been removed and after the federal court had dismissed the case at the request of plaintiffs. We turn to that issue.

III

Federal law provides that once a case is removed to federal court "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C.

§ 1446(d). Section 1446(d) clearly prohibits state courts from taking any action on the merits of the removed case. *See, e.g., Murray v. Ford Motor Co.*, 770 F.2d 461, 463 (5th Cir.1985) (holding that a state trial court had no power to set aside a default judgment after the case had been removed). However, whether section 1446(d) permits state courts to sanction counsel after removal for pre-removal conduct when such sanctions have no effect on the merits of the removed case is another matter. We have found few cases or commentators that directly address the question. *See, e.g., Stroud v. VBFSB Holding Corp.*, 917 S.W.2d 75, 83-84 (Tex. App. – San Antonio 1996, writ denied) (holding that the trial court had no jurisdiction to sanction counsel for *post*-removal conduct); *Jackson v. State*, 337 So. 2d 1281, 1283 (Ala.1976) ("We need not decide . . . whether [removal to federal court] divested the state court of power to cite appellant [a lawyer] for contempt."); 14A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3737 (2d ed. 1985 & Supp.1997) (citing only cases holding that state courts are powerless to take any action with respect to the merits of the removed action unless and until remanded); 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.31[2] (3d ed. 1997) (same).

At least one Texas state court has held that removal of the underlying case did not foreclose consideration of a pending motion for contempt and sanctions against a party to the litigation and that party's counsel. *Stewart Title Co. v. Street*, 731 S.W.2d 737, 739-40 (Tex.App. – Fort Worth 1987, orig. proceeding). The court of appeals in *Stewart* concluded that although the trial court had no jurisdiction after removal to strike the party's pleadings

as punishment for contempt, the trial court did have jurisdiction to issue an order directing counsel to show cause why he should not be punished for contempt. *Id.* We neither approve nor disapprove of this holding to the extent that it permits attorneys to be sanctioned for filing a petition for removal. That issue is not before us.

We do, however, find guidance in federal caselaw which holds that federal courts retain jurisdiction even after a case has been remanded to state court to sanction counsel for post-removal conduct that occurred in federal court. *See Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 445-46 (9th Cir.1992). The same principle applies to suits originally filed in federal court; the trial court retains jurisdiction to sanction counsel for his or her conduct during the proceedings even after the plaintiff files a notice of dismissal, *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 2456, 110 L.Ed.2d 359 (1990), and after an action is dismissed for want of jurisdiction, *see id.* at 395 (citing 28 U.S.C. § 1919). In *Willy v. Coastal Corp.*, 503 U.S. 131, 137, 112 S.Ct. 1076, 1080, 117 L.Ed.2d 280 (1992), the United States Supreme Court relied upon its holding in *Cooter* and recognized that sanctioning counsel for their conduct is collateral to the merits of the underlying case. 503 U.S. at 137-38, 112 S.Ct. at 1080-81. Sanctioning counsel is "not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Cooter*, 496 U.S. at 396, 110 S.Ct. at 2456.

Judge Bennett found that plaintiffs' counsel had abused the judicial process. He imposed sanctions on the

lawyers, not on their clients. Judge Bennett's determinations had no bearing whatsoever on the merits of the claims that were removed to federal court. Nor did his rulings interfere with or tend to have any chilling effect on the pursuit of jurisdiction in the federal system.

We are also mindful that abuse of the state judicial process may be placed beyond the reach of any court, state or federal, were we to conclude that state courts should not go forward after removal with an adjudication of sanctions for pre-removal conduct of counsel. That is because federal courts have no authority to impose sanctions for pre-removal conduct that occurred in state court. *See Willy v. Coastal Corp.*, 915 F.2d 965, 968 n. 8 (5th Cir.1990), *aff'd*, 503 U.S. 131, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992).

From our review of federal precedent and in light of the practical ramifications, we conclude that state courts retain jurisdiction after removal of a case to federal court to sanction lawyers for pre-removal conduct so long as the sanction does not operate upon the merits of the underlying action. Accordingly, the court of appeals erred in concluding that Judge Bennett did not have jurisdiction to consider the imposition of sanctions in this case.

The final issue is whether the imposition of sanctions was appropriate under the facts of this case.

IV

Counsel for the plaintiffs contend that the trial court abused its discretion by sanctioning them. The court of

appeals agreed, writing in dicta that even if Judge Bennett had plenary jurisdiction, he had no authority to impose sanctions *sua sponte*. 925 S.W.2d at 341-42. We disagree.

Courts possess inherent power to discipline an attorney's behavior. *See Lawrence v. Kohl*, 853 S.W.2d 697, 700 (Tex. App. – Houston [1st Dist.] 1993, no writ) (holding that trial courts have the power to sanction parties for bad faith abuse of the judicial process not covered by rule or statute); *Kutch v. Del Mar College*, 831 S.W.2d 506, 509-10 (Tex. App. – Corpus Christi 1992, no writ) (same); *see also Public Util. Comm'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988) (recognizing the inherent power of courts to ensure an adversarial proceeding); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-99 (Tex. 1979) (recognizing that a court has inherent power "which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity"). A court has the inherent power to impose sanctions on its own motion in an appropriate case.[5]

Plaintiffs' counsel admitted that the filing scheme was designed to ensure adjudication by a particular judge. The practice of filing multiple cases without intent

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[5] For suits commenced on or after September 1, 1995, the Texas Civil Practice and Remedies Code authorizes a trial court to impose sanctions on its own initiative for certain conduct if the show cause order is issued before a voluntary dismissal or settlement of claims. *See* TEX. CIV. PRAC. & REM. CODE §§ 10.002(b), 10.004(e) & historical notes [Act of May 4, 1995, 74th Leg., R.S., ch. 137, § 2, 1995 Tex. Gen. Laws 977, 978]. We need not decide whether the conduct in this case is covered by these statutes.

to prosecute most of them, in search of a court perceived to be sympathetic, subverts random assignment procedures that are in place in many multi-court counties and is an abuse of the judicial process. This type of conduct, if tolerated, breeds disrespect for and threatens the integrity of our judicial system.

The power to sanction is of course limited by the due process clause of the United States Constitution, as urged by plaintiffs' counsel. The lawyers sanctioned in this case cannot deny that they were fully aware of the purposes of the random assignment system. They intentionally attempted to circumvent those purposes. Counsel were given notice of the court's intention to consider sanctions and were given an opportunity to respond. Due process was not violated in this case. The court of appeals abused its discretion in directing Judge Bennett to vacate the order sanctioning counsel in this case.

* * *

Accordingly, the Court grants Relators' motion for leave to file, and, without hearing oral argument, conditionally grants the writ of mandamus. TEX.R.APP. P. 59.1. The writ will issue only if the court of appeals fails to vacate its writ of mandamus.

APPENDIX B
CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

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28 U.S.C. §1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had,

may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX C

* * *

LOCAL RULES OF ADMINISTRATION PROPOSED BY THE CORPUS CHRISTI BAR ASSOCIATION, AS MODIFIED AND ADOPTED BY THE JUDGES OF NUECES COUNTY, TEXAS

These Rules of Judicial Administration of Nueces County, Texas apply to and are to be followed by all duly licensed attorneys and individuals representing themselves in all matters pending in the District Courts and County Courts at Law, subject to 72.002(2) of the Texas Government Code.

The Judges of this county will promulgate Local Rules pursuant to 74.092, and 74.093, subject to Rule 3a of the Texas Rules of Civil Procedure.

Drafting Notes: (NCR 1:14, Section 74.024(3), 74.092 and 74.093 G.C.) (FLR 1.11)

Organizational Notes: The Nueces County Bar Association, the Judges of Nueces County, the Judges and the Rules Committee of the Fifth Region, have contributed to the drafting if [sic] these Rules to expedite the administration of Justice, and to safeguard the rights of litigants during the just processing of their cases. The sources of these Rules are identified by the following acronyms:

CCBA – Corpus Christi Bar Association's Proposed Civil and Felony Criminal Rules, as modified.

FLR – Friesen's Proposed Local Rules.

NCR – Old Nueces County Rules.

ROJA – Rules of Judicial Administration promulgated by the Supreme Court of Texas, February 4, 1987.

RROA – Rules of Administration promulgated by the 9 Regional Judges on March 16, 1987.

G.C. – Texas Government Code Judicial Branch.

* * *

RULE 1: TIME STANDARDS

Pursuant to Article 5, Section 31 of the Texas Constitution, Sections 22.004, 72.002(2) and Section 74.024 of the Texas Government Code, Rule 6 of Rules of Judicial Administration promulgated by the Supreme Court of Texas, and applicable Regional Rules of Administration, time standards have been established to which reference is made for all purposes, as they now exist, or as they may be hereafter amended.

RULE 2: OFFICE OF COURT ADMINISTRATION REPORT

The Local Administrative Judge shall cause the proper clerk to send the regional Presiding Judge a copy of the report sent each month to the Office of Court Administration, and such other information regarding docket management systems of the county as may be requested by the Presiding Judge.

RULE 2.1 FIXING RESPONSIBILITY FOR MONITORING INFORMATION REQUIREMENTS, HOW SUPPLIED

The District and County Clerks shall be responsible individually to each

and all the Judges and Local Administrative Judge of the county for the accurate collection and reporting of such information as may be required in writing by the Regional Presiding Judge, the Supreme Court, or the Office of Court Administration. Each Judge will have direct access to any such information, as reported and the supporting data collected at all reasonable times, Monday through Friday during working hours, and the Clerks shall produce all such and deliver same to any Judge upon request.

Drafting Notes: (FLR 2.12 Modified for each Judge's individual control and accessibility to the data, see ROJA 5h, 4d, (3), 9(b)(9), and Rule 2 ROJA.)

RULE 3: THE PROCESSING OF GENERAL CIVIL CASES AND OTHER CASES WHEN APPLICABLE

All cases are to be filed, docketed, and assigned pursuant to Rule 10b of the Rules of Judicial Administration of the Supreme Court of Texas and Section 74.093, 74.121, and 75.011(i) Texas Government Code. Thereafter, the Courts may at any time exchange cases and Benches to accommodate their dockets or to specialize the Court's trials.

Drafting Notes: (See Chapter 74.121 and 75.011(i) Texas Government Code, and any other statutory or constitutional authority.)

Except as provided hereafter in this Rule, all cases shall be filed with the Clerks of the District Courts and County Courts at Law in random order, or in the manner prescribed by the Local Administrative Judge, and shall be assigned, insofar as practicable, in a fair and equitable manner among the Courts.

Drafting Notes: (The assignment of cases will be subject to enactments pursuant to Sections 25.1802 only Nueces County, and 74.093(d), 74.094(a); 74.121 of the Texas Government Code, Supreme Court Rules 10b, the Regional Rules of Administration 3, 4, 5, as well as Section 75.011(i) and appendix c. This is a combination of NCR 1:1 and 10b ROJA, RROA 3, 4 & 5 and the new Legislative acts.)

Rule 3.1: TRANSFER OF CASES WITHIN THE COURTS

After assignment to a particular Court, every case, both jury and non jury, shall remain pending in such court until final disposition, or transfer. Any case may be transferred to another Court by order of the Judge of the Court in which the case is pending with the consent of the Judge of the Court to which it is transferred; or by order of the Local Administrative Judge of this County.

Drafting Notes: (NCR 1:2 Rule 10b ROJA, Rule 3 hereof, and Rule 3 RROA and Section 74.121 Texas Government Code.)

Whenever any pending case is so related to another case pending in or disposed of by another Court the Judge of the Court in which either case is or was pending may, upon motion (including his own motion), and notice transfer the case to the Court in which the earlier case was filed to facilitate the orderly and efficient disposition of the litigation.

Drafting Notes: (Sections 25.0012, 25.1802, 74.093(d), 74.094(a), 74.121 and Section 75.011(b) and (i) Texas Government Code)

The following types of cases shall be subject to transfer under this rule, but this listing is not exclusive and is given by way of example only:

(a) Any case arising out of the same transaction or occurrence as did an earlier filed case, particularly if the earlier case was dismissed for want of prosecution or voluntarily dismissed by plaintiff at any time before final judgment.

Drafting Notes: (NCR 1:7a)

(b) Any case involving one or more of the same parties as an earlier filed case and requiring a determination of any of the same questions of fact or of law as those involved in the earlier case.

Drafting Notes: (NCR 1:7b)

(c) Any case involving a plea that a judgment in the earlier filed case is conclusive of any of the issues of the later case by way of res judicata or estoppel by judgment, or any pleading that requires a construction of the earlier signed judgment or a determination of its effect.

Drafting Notes: (NCR 1:7c)

(d) Any suit for a declaration concerning the alleged duty of an insurer to provide a defense for a party to another suit.

Drafting Notes: (NCR 1:7d)

(e) Any suit concerning which the duty of an insurer to defend was involved in another suit.

Whenever a case is transferred to a county by a court of another county, it shall be assigned in the manner specified by these Rules.

Drafting Notes: (NCR 1:7(e) 1.8)

The Local Administrative Judge of this county shall supervise the assignment of cases in the Courts for the fair distribution of the caseload among the Judges in the County, subject to Rules pertaining to specialized criminal courts and the application of Sections 25.1802, 74.093(d), 74.094(a), 75.011(i) and Section 75.121 Texas Government Code. The distribution of criminal cases is to be governed by Rule 5 of

these Rules, as they now exist or as hereinafter amended.

Drafting Notes: (ROJA 10b; RROA 3, and Rule 3 hereof.)

* * *

RULE 3.12: MOTIONS AND OTHER PRELIMINARY MATTERS PRE-TRIAL CONFERENCES

A pre-trial conference may be held at the request of the Court or of the attorneys in charge as defined in Rule 8 of the Texas Rules of Civil Procedure. If the pre-trial conference is set at the request of the attorneys, it shall be held no later than ten (10) days prior to the date set for trial, unless the Court, on timely request of one or more attorneys in charge, orders otherwise.

(a) Preliminary matters which require a hearing by the Court may be disposed of either (1) by hearing before the Court or (2) upon such written authorities as counsel may forward to the Court, following which the Court may rule in chambers without any hearing as provided in this Rule. Any party is entitled to a hearing so long as the same is requested prior to the time that the Court enters its ruling.

Drafting Notes: (NCR 4:5a)

(b) Any party who desires a ruling on any matter pending shall request a

ruling either by (1) requesting a hearing or (2) filing a statement with the authorities, if any, relied upon, along with a request for ruling by the Court without a hearing. The opposing party may, within ten (10) days after service of such statement, either (1) request a hearing or (2) file a written response.

Drafting Notes: (NCR 4:5b)

(c) If no hearing is requested within seven (7) days after the time for requesting a hearing or for filing a response has expired, the Judge, in the absence of the attorney in charge, shall examine the pleadings, authorities cited, and other papers and make such rulings as he deems proper, note a memorandum of such ruling among the papers of the cause, and send copies of such memorandum to counsel for all parties.

Drafting Notes: (NCR 4:5c)

SCHEDULING

(d) All requests for the scheduling of appearances for the Court for any purpose will be made by contacting the Court Coordinator who will arrange an appropriate time to appear before the Court.

Requests for hearing shall be made to the Court in which the matter is pending, in accordance with these rules, and the attorneys making such request shall notify all counsel of the date and

hour set for hearing and of the particular matter which will be considered at such time.

Drafting Notes: (NCR, 3:3, 4:5d)

COPIES OF ORDERS

(e) Copies of all Orders entered pursuant to this rule shall be forwarded by the clerk to all counsel at the time they are entered.

Drafting Notes: (NCR 4:5e)

RULE 12: LOCAL ADMINISTRATION

Election of The Administrative Judge

(a) Subject to Section 74.091 of the Texas Government Code a majority of the Judges of the County will prescribe the term of the office of the Administrative Judge.

The Local Administrative Judge will have duties and the responsibility for attending to emergency and special matters of the District Court pursuant to the Supreme Court's Rule 9 and 10 (d) Rules of Judicial Administration.

* * *

(d) COURT BUSINESS, INHERENT POWERS, AND AUTHORITY

Pursuant to 74.002, 74.011(i), 74.024, Rule 9b of the Supreme Court Rules of Judicial Administration and Rule 3(a) of the Texas Rules of Civil Procedure the Judges will, as necessary, from

time to time make rules and orders pursuant to the Supreme Court Rules of Judicial Administration.

Drafting Notes: (Modified Rule 2(b) NCR, NCR 1:13, Section 74.024(a)(2) Texas Government Code, and Rule 165 of the Texas Code of Civil Procedure, ROJA 9 and Rule RROA 1.)

RULE 12.1: NON-JUDICIAL PERSONNEL

The Local Administrative Judge of the County shall supervise the court administrator program and shall be responsible for all administrative matters peculiar to the Courts (as distinguished from judicial matters), subject to section 72.002(2) of the Texas Government Code, and the Rules of Judicial Conduct. The Local Administrative Judge shall periodically review the case flow procedures and operations of the court administrator program and shall recommend necessary changes to the Judges.

To enhance the administration of justice each Judge shall control the employees of his or her Court, including those (of other entities) who render services directly to such court.

Drafting Notes: (NCR 2:2 Modified, Judicial Cannons 3b(2).)

RULE 12.11: DUTIES OF COURT ADMINISTRATOR AND COURT COORDINATORS

Each Court Coordinator serves at the pleasure of the Appointing Judge or his successor in office. The Court Coordinator and related staff will perform such administrative duties as may be assigned to them by the Local Administrative Rules of the Judges. Neither the Court Administrator nor the Court Coordinators will perform any judicial (as opposed to administrative) function.

Drafting Notes: (Section 74.101(b), G.C., Section 74.102(a), G.C., NCR 3:1.)

RULE 12.12: Each Judge will appoint appropriate staff and support personnel to serve at the will of the Judge according to the needs of each Court including a bailiff, who may be a deputy sheriff and who shall be present at all times while the Court is in session or in recess, unless excused by the Judge. No duties shall be assigned to the bailiff except upon approval by the Judge of his or her Court.

Drafting Notes: (Section 74.103, Texas Government Code.)

RULE 12.13: CONDUCT AND DECORUM OF ATTORNEYS BEFORE THE COURT

(a) Each day the Court is engaged in hearing a matter, the Court shall be opened by the bailiff directing all

Court officials and spectators to their seats.

(b) In reconvening after recess, the bailiff shall cause all persons to be seated before the Judge enters.

(c) When the trial is to a jury, the jurors shall take their places in the jury box before the Judge enters the Courtroom for reconvening.

(d) The bailiff shall see that the flag of the United States and the flag of the State of Texas are properly and prominently displayed at some convenient place in the courtroom.

(e) While the Court is in session, there shall be:

(1) No smoking, [sic] (or use of tobacco products).

(2) No reading of newspapers or magazines.

(3) No propping of feet on tables or chairs.

(4) No loud noises or talking.

(5) No gum chewing.

(f) In addressing the Court, lawyers shall rise and remain standing at their positions at counsel table. They shall not approach the bench except with permission or on request of the Court.

(g) Lawyers shall not lean on the Bench, sit on rails or tables, or appear

to engage the Court in a confidential manner.

(h) All male lawyers shall wear coats and ties while in attendance of the Court, unless otherwise permitted by the Court.

(i) Lawyers shall advise their clients and witnesses of the formalities of the Court, unless otherwise permitted by the Court.

(j) The lawyers, the Judge, and all other officers of the Court shall be prompt at all sessions and in the dispatch of all Court business.

(k) All counsel are admonished to respect the letter and the spirit of all applicable rules or codes of professional responsibility, including, particularly, those dealing with discussion of cases with the Court outside the Courtroom and not in the presence of opposing counsel. The Court shall enforce the same by appropriate action.

(l) All remarks of counsel to the Court shall be addressed to the Court and not to the Judge as an individual.

(m) Once an attorney has entered the Courtroom and appeared before the Court, he shall not leave without obtaining permission from the Court.

Drafting Notes: (NCR 5:1a, NCR 5:1b, NCR 5:1c, NCR 4.1d, NCR 5.1e, NCR 5:1f, NCR 5:1g, NCR 5:1h, NCR 5:1i, NCR 5:1j, NCR 5.1.)

RULE 12.14: The following are prohibited: broadcasting, televising, recordings, or taking photographs in the Courtroom and areas adjacent thereto, being all parts of the fourth, seventh, eighth and ninth floors of the Nueces County Courthouse, during sessions of Court or recesses between sessions (Estes vs. Texas, 381 U.S. 532; Sheppard vs. Maxwell, 384 U.S. 333), except that a Judge may authorize:

(a) the use of electronic or photographic means for the presentation of a record, or other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investive, or ceremonial proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after

the proceeding has been concluded and all direct appeals have been exhausted;

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

(d) The taking of photographs (video taping) or the broadcasting of judicial proceedings in or from the Courtroom, or so close thereto as to disturb the order and decorum thereof, either while Court is in session or at recess, is prohibited. Such activities are prohibited on the fourth, seventh, eighth and ninth floors of the Nueces County Courthouse Tower.

Drafting Notes: (NCR 5:k, Modified by Resolution of Judges, 1986)

* * *

ADOPTION OF RULES

These rules are adopted by Nueces County Texas, on this the 24th day of October, 1988, and forwarded to the Texas Supreme Court for approval on the 4th day of November, 1988, to be effective on the 1st day of January 1989.

/s/ Jack E. Hunter _____

/s/ Illegible _____

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Drafting Notes: Article 5, Section 31 of the Texas Constitution, Sections 22.004, 25.1802, 72.002(2), 74.011(i), 74.024, 74.093(d), 74.094(a), of the Texas Government Code, Rule 3(a) of the Texas Rules of Civil Procedure, Rule 10 of the Supreme Court Rules of Judicial Administration, and the Recommended Regional Rules of Administration.)

Order of

the Supreme Court of Texas

Pursuant to Rule 3a of the Texas Rules of Civil Procedure, the Supreme Court hereby approves the Local Rules of Administration for the Courts of Nueces County, Texas, proposed by the Corpus Christi Bar Association, modified and adopted by the Judges of Nueces County, subsequently approved by the Presiding Judge of the

Fifth Administrative Region and submitted to this Court on November 2, 1988.

The approval of these rules is temporary, pending the adoption of uniform local rules.

In Chambers, this 6th day of December, 1988.

/s/ Thomas R. Phillips
Thomas R. Phillips, Chief Justice

/s/ Franklin S. Spears
Franklin S. Spears, Justice

C. L. Ray, Justice

/s/ Ted Z. Robertson
Ted Z. Robertson, Justice

/s/ William W. Kilgarlin
William W. Kilgarlin, Justice

/s/ Raul A. Gonzalez
Raul A. Gonzalez, Justice

/s/ Oscar H. Mauzy
Oscar H. Mauzy, Justice

/s/ Barbara G. Culver
Barbara G. Culver, Justice

/s/ Eugene A. Cook
Eugene A. Cook, Justice

APPENDIX D

No. 95-4900-G

TIMOTEO AGUILAR CŌAGUILA, et al	) IN THE DISTRICT COURT
VS.	) 319TH JUDICIAL DISTRICT
SOUTHERN PERU COPPER CORPORATION, et al	) NUECES COUNTY, TEXAS

MOTION FOR SANCTIONS
November 10, 1995

APPEARANCES:

THE HONORABLE MAX BENNETT, JUDGE
319th Judicial District Court
Nueces County Courthouse
Corpus Christi, Texas 78401

JUDGE PRESIDING

MR. ERIC BROWN
Brin & Brin
Attorneys at Law
1202 Third Street
Corpus Christi, Texas 78404

ATTORNEY FOR THE RESPONDENTS

MR. EDUARDO ROBERTO RODRIGUEZ
Rodriguez, Colvin & Chaney
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1201 East Van Buren Street
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Brownsville, Texas 78522

ATTORNEY FOR THE DEFENDANTS

ALSO APPEARING:

MR. ROBERT C. HILLIARD
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Corpus Christi, Texas 78401

MR. ANDREW SCHIRRMEISTER, III
Zummo & Schirrmeister
Attorneys at Law
2603 Augusta, Suite 1200
Houston, Texas 77057

ATTORNEYS FOR THE PLAINTIFFS

On the 10th day of November, 1995, the above entitled and numbered cause came on for hearing before said Honorable Court, Honorable Max Bennett, Judge Presiding, and the following proceedings were had, to-wit:

THE COURT: All right. This court would take judicial notice of the denial of the Court of Appeals – 13th Court of Appeals – of petitioner's motion for leave to file petition for writ of mandamus against the judge of this court in sanctions notice to counsel for the plaintiffs in Cause No. 95-4900-G, Timoteo Aguilar Coaguila and Maria Magdalena Llanos, individual and as next friend of Regman Aguilar Llanos, a minor vs. Southern Peru Copper Corporation, et al. This court will proceed today only on the matter of sanctions against counsel for those plaintiffs arising from the filing and notice of nonsuit in Cause No. 95-4900-G, in the District Court of the 319th Judicial District.

For the purpose of the record, is there a member of the District Clerk's staff present?

DISTRICT CLERK: Yes, Your Honor.

THE COURT: Would you come forward, please, with your cases and your memorandum, please.

MR. BROWN: Your Honor, may I be heard?

THE COURT: Yes, sir.

MR. BROWN: Eric Brown on behalf of Robert Hilliard and Andrew Schirrmeister individually, and we at this time lodge our objection to the court proceeding in the sanction hearing against the attorneys individually, based on our written response, specifically on the court lacking jurisdiction to impose sanctions in this case. The jurisdiction of the court has expired as to this case. It was nonsuited on – February – excuse me – September 5th, 1995. It is more than 30 days past that. At the time of the nonsuit there were no motions pending for sanctions or any other affirmative relief, and we respectfully object to the court exercising jurisdiction over the attorneys individually and ask that they be excused.

THE COURT: Your objection is overruled. Case law and the power of this court is to the contrary. You may identify yourself and others here and who you represent. You represent both of the respondent attorneys?

MR. BROWN: Mr. Hilliard and Mr. Schirrmeister.

THE COURT: And they're both present?

MR. BROWN: Yes.

MR. HILLIARD: Your Honor, Bob Hilliard present.

MR. SCHIRRMEISTER: Andrew Schirrmeister.

MR. RODRIGUEZ: Your Honor, for the record, my name is Eduardo Roberto Rodriguez, and I represent Southern Peru Copper Company and the defendants, and I'm here pursuant to the court's order for this hearing.

THE COURT: Very well. All right. Will the district clerk come forward, please.

If you will raise your right hand, both of you, please, and be sworn.

(Two witnesses sworn by the Court).

THE COURT: If you'll take the stand, and I'll be asking you some questions. You'll be permitted to ask questions likewise.

MR. BROWN: Your Honor, I don't mean to interrupt, but I wish to lodge one additional objection of jurisdiction before the testimony begins, and that is the objection that the case under which the court is proceeding is not only being nonsuited, it has been removed, a petition for removal filed in federal court, and, therefore, even if the nonsuit was ineffective, the state courts do not have jurisdiction except upon remand. I'd like to lodge that additional objection to this hearing.

THE COURT: That objection is noted. This court intends to take no action today against the plaintiffs in that case. This action, we're proceeding today only on

sanctions against the attorneys and the alleged misuse of the judicial process in this county.

MR. BROWN: All right.

THE COURT: Your objection is so noted.

MR. BROWN: Okay.

THE COURT: All right.

MR. BROWN: Excuse me, Your Honor. Is the objection overruled?

THE COURT: Your objection's overruled.

CAROLYN SPANUTIUS,

called as a witness by the Court, having been first duly sworn by the Court, testified upon her oath, as follows, to-wit:

DIRECT EXAMINATION

BY THE COURT:

Q All right. Will you state your name, please?

A Carolyn Spanutius.

Q All right. In the interest of time, would you please state for the record what cases were filed, and, if you will, you need only name the first named plaintiff in each case and the first named defendant in each case in the various cases filed, starting with Cause No. 95-4900-G, and some 16 other cases, against the defendant Southern Peru Copper Corporation, et al. Would you state for the record when those cases were filed and what activity has transpired in those cases.

A Okay. In 95-4900-G, Timoteo Aguilar C-o-a-g-u-i-l-a, et al, was filed August 30th, '95, at 3:24 p.m. In 95-4910-A is Luis A-l-a-r-c-o-n A-n-d-i-a, et al vs. Southern Peru, filed August the 30th, '95, at 3:30 p.m.; 95-4902-F, was Luis Alberto Chambi M-a-m-a-n-i, et al vs. Southern Peru, filed August 30th of '95, at 3:38 p.m.; 95-4905-B is Filomeno A-l-e-j-o M-a-y-t-a vs. Southern Peru, August the 30th, '95, at 3:43 p.m.; 95-4906-B is Carlos Alfredo Jano H-u-i-s-o, et al vs. Southern Peru, filed August 30th of '95, at 3:46 p.m.; 95-4908-F is Melchor A-n-e-s-q-u-i-t-a Vargas vs. Southern Peru, filed August the 30th of '95 at 3:50 p.m.; 95-4909-E, is Mario Angel Aguilar vs. Southern Peru at 8-30-95 at 3:53 p.m.; 95-4910-C is Juan Angel C-a-s-t-a-n-o-n, last name, T-u-r-p-o, et al vs. Southern Peru, filed August 30th of '95, at 3:57 p.m.; 95-4936-A is Miguel Angel Landauro Montoya, et al vs. Southern Peru, filed 8-31-95 at 11:14 a.m.; 95-4937-C, Javier Angel Ramos Mancelo, et al vs. Southern Peru, filed August 31st, '95; at 11:18 a.m.; 95-4938-A is Ricardo Angulo C-u-n-c-h-a-y-a, et al vs. Southern Peru, filed August 31st, '95, at 11:24 a.m.; 95-4939-A is Julio A-n-g-u-l-o Espinoza against Southern Peru, filed August 31st, '95, 11:28 a.m.; 95-4942-E is Francisco Anquise Puma, et al, Southern Peru, filed August the 31st, '95, at 12:15 p.m.; 95-4943-H is Donato Apaza C-a-y-o, et al vs. Southern Peru, filed August the 31st, '95, at 12:21 p.m.; 95-4944-E is Y-e-s-d-a-o Apaza Fernandez, et al vs. Southern Peru, August the 31st, '95, at 12:25 p.m.; 95-4945-C is Yolinda Arazamendi de Castro et al vs. Southern Peru, filed August 31st, '95, at 12:31 p.m., and 95-4946-D is Gerardo Arias Torres, et al vs. Southern Peru, filed August the 31st, '95, 12:37 p.m. Okay. Then, case number, where is the case number on

this thing? Right here. In 95-4900-G, the case was dismissed by the plaintiff 9-5-95; case 95-4901-A was dismissed by the plaintiff 9-5-95 –

Q May I interrupt you?

A Yes, sir.

Q In what manner was it dismissed?

A Plaintiff's notice of nonsuit.

Q So, when you say "dismissed," you're referring to?

A The nonsuit.

Q Filed notice of nonsuit?

A Yes, Your Honor.

Q Were there any other orders concerning dismissal by any court on those cases in which notices of nonsuit were filed?

A No, sir.

Q All right. Briefly, for the record, will you state the other cause numbers in which a notice of nonsuit was filed and when it was filed.

A Okay. I believe I left off with 4901? 95-4902, there was no nonsuit filed. 4905, this was dismissed by plaintiff.

Q Once again –

A Just the ones with the dismissal?

Q No, no. When you refer to the word "dismissed," are you referring to a notice of nonsuit, and are you characterizing that as a dismissal?

A Maybe I should use the copies of this. 95-4906-B, plaintiff's notice of nonsuit; 4908-F is the plaintiff's notice of nonsuit; 95-4909-E, plaintiff's notice of nonsuit; 95-4910-C, plaintiff's notice of nonsuit; 95-4936-A is the plaintiff's notice of nonsuit; 95-4937-C, plaintiff's notice of nonsuit; 95-4938-A, plaintiff's notice of nonsuit; 95-4939-A, plaintiff's notice of nonsuit; 95-4942-E, plaintiff's notice of nonsuit; 95-4943-H is the plaintiff's notice of nonsuit; 95-4944-E is the plaintiff's notice of nonsuit; and 95-4945-C is the plaintiff's notice of nonsuit.

Q What was the last case, the highest numbered case filed?

A 95-4946-D.

Q All right. Was there a notice of nonsuit filed in that case?

A No, sir.

Q Was there an amended original petition filed in that case?

A Yes, sir, I believe there is. Plaintiff's first amended petition, was filed August the 31st of '95.

Q Did that amended original petition add additional plaintiffs to that cause?

A Yes, sir, it did.

Q Approximately how many additional plaintiffs?

A We were still adding the plaintiffs when I left. We were up to 200 some-odd plaintiffs that have been added.

Q All right. You have referred to court designations by letter?

A Uh-huh.

Q Would you explain, for the purpose of the record, when you say A, C, D, F, G, what court you're talking about?

A Okay. In 95-4900-G is the 319th Judicial District; 95-4910-A is the 28th Judicial District; 95-4902-F is the 214th Judicial District; 95-4905-B is the 117th Judicial District; 95-4906-B is the 117th Judicial District; 95-4908-F is the 214th Judicial District; 95-4909-E is the 148th Judicial District; 95-4910-C is the 94th Judicial District; 95-4936-A is the 28th Judicial District; 95-4937-C is the 94th Judicial District; 95-4928-A, the 28th Judicial District; 95-4939-A, the 28th Judicial District; 95-4942-E is the 148th Judicial District; 95-4943-H is the 347th Judicial District; 95-4944-E is the 148th Judicial District; 94-4945-C is the 94th Judicial District.

Q Very well. As far as you can determine – first of all, how many total cases were filed against the defendant corporations?

A Okay. Seventeen.

Q As far as you can determine, were any of the plaintiffs named in the first 16 cases named as plaintiffs either in the original petition or the amended original petition in the 17th case?

A I would have to look at the amended petition, Judge.

THE COURT: Can we have a stipulation on that, Mr. Brown?

MR. HILLIARD: Could you repeat, please, sir?

THE COURT: The question is, were any of the plaintiffs named in the first 16 cases also named in the 17th case, either in the original petition or the amended original petition?

MR. HILLIARD: There were none.

THE COURT: We have a stipulation? The record will so reflect that none of the plaintiffs named in the first 16 petitions were named in the 17th petition filed in the 105th District Court.

MR. RODRIGUEZ: Your Honor, for purposes of the record, in reviewing a pleading that was filed on 9-9-95, there are three people whose names are similar to people that were plaintiffs in the first 16 cases, including in the case in this court. There was plaintiff Maria Magdalena Llanos. She's – there's a person named in the pleading filed in September by the name of Maria Magdalena Llanos de Aguilar. Whether it's the same person or not I can't make the representation to the court.

THE COURT: Mr. Hilliard.

MR. HILLIARD: It is not the same person.

THE COURT: All right. All right.

Q (By the Court) Would you tell the process by which cases are filed in the District Clerk's Office under the local rules and orders of the district courts?

A We are the keeper of the records. When a person comes up to file a case at the counter, they – we receive the case, we file mark it, we take their deposit, we give them a court and a case number. We do not check the records to see if there's any previous cases filed. That – after that is done, it's put into the computer, is sent back to our label department where the additional plaintiffs and defendants are put in, and it is sent from there to our service department if service is issued on it, then, up to the courts.

Q Is that system a random-filing system, that is, one in which a filing attorney cannot select a court for his case?

A Yes, Your Honor, it is random draw.

Q Have you always been instructed to utilize that process in every case?

A Yes, Your Honor, they have been.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. BROWN:

Q Ms. Spanutius, the cases that the court has asked you about, the ones by cause number that have all been here?

A Uh-huh.

Q Were each of those cases randomly assigned to the various courts by the District Clerk's Office?

A Yes, sir, they were.

Q Earlier you mentioned a dismissal by the plaintiff. Is that correct?

A Uh-huh.

Q Is that because the dismissal is by notice of nonsuit filed by the plaintiff?

A Yes, sir, it is by notice of nonsuit.

Q It's under Rule 162 of the Texas Rules of Civil Procedure?

A I believe so, yes, sir.

MR. BROWN: One moment, Your Honor.

Q (By Mr. Brown) Ms. Spanutius, were the filing fee court costs in each case tendered to the clerk at the time of filing?

A Yes, sir.

Q And have the notice of nonsuits in each of those cases where they were filed, have they been entered in the minutes of the court?

A They have.

MR. BROWN: No further questions.

THE COURT: Let me ask you a question. How much were the court costs paid in each of the 17 cases?

THE WITNESS: I don't know if we got that, Judge. Do you have that? I can get it for you within a matter of minutes.

THE COURT: All right. We'll call you back for that purpose. Let me ask you, if you can testify, was service of citation requested in any of the first 16 cases?

THE WITNESS: Let me see the cases if we got citations.

THE COURT: Can we have a stipulation that service of citation was not requested in the first 16 cases?

MR. HILLIARD: Yes, sir

MR. BROWN: Yes.

THE COURT: Was service of citation requested in the 17th case?

THE WITNESS: There's no service written on the outside of the jacket, and that was in Cause No. 95-4946-D, the 105th Judicial District.

THE COURT: That service was not requested?

THE WITNESS: It has here "No Service," but on the printout that Mr. Zavala just showed me, there was citations done for Southern Peru, ASARCO; C-e-r-r-o Trading Company, Inc.; Cerro Sales Corporation; Marmon Corporation; Marmon Holding, Inc.; Marmon Group Inc.; Phelps Dodge Overseas Capital; Phelps Dodge Corporation; Phelps Dodge Refining Corporation; Newmont Gold Corporation; Newmont Mining Corporation.

THE COURT: Very well. Any further questions by Mr. Brown?

MR. BROWN: May I have a moment, Your Honor?

No further questions.

THE COURT: All right. Would you please find for us, while you're off the stand, the amount of court costs paid in each case, please?

THE WITNESS: We will.

THE COURT: And be standing by for further testimony.

THE WITNESS: Okay.

THE COURT: Let us know when you're back.

All right. We'll hear from Mr. Hilliard now.

Mr. Hilliard, would you like to come forward and tell us why you should not be sanctioned for –

MR. BROWN: May I confer with my client for a minute?

THE COURT: Yes, sir.

MR. HILLIARD: Your Honor, subject to my counsel's following objection, I'm prepared to –

MR. BROWN: Your Honor, we object to the court asking Mr. Hilliard to take the stand and be made to give testimony against himself in proceedings which the court has indicated pursuant to its order that the court intends to consider sanctions against the attorney, Mr.

Hilliard, individually, and we believe, you know, that under the Texas Constitution and the United States Constitution, he has the right, because of the sanctions, not to be made a witness against himself.

THE COURT: All right. Your objection's overruled. Come forward.

MR. HILLIARD: Knee surgery, Judge.

THE COURT: All right. Mr. Hilliard, I'm gonna waive the oath since you are an officer of the court, and I'm gonna ask you a few questions, afterwards which I'm even gonna give you the opportunity to make comment.

ROBERT C. HILLIARD,

called as a witness by the Court, the oath having been waived by the Court testified as follows, to-wit:

DIRECT EXAMINATION

BY THE COURT:

Q First of all, did you cause to be filed some 17 lawsuits in the district courts of this county that have previously been referred to?

A I did.

Q You did?

A Yes, sir.

Q And did you cause those lawsuits to be filed in such a manner that you and only you, your cocounsel and/or your plaintiffs, attempted to select the judge and/or court that your litigation would be tried in?

A If you'll give that question to me one more time.

THE COURT: The court reporter will read the question back.

THE COURT REPORTER: "And did you cause those lawsuits to be filed in such a manner that you and only you, your cocounsel and/or your plaintiffs, attempted to select the judge and/or court that your litigation would be tried in?"

THE WITNESS: I did not.

Q (By the Court) Did you file notices of nonsuit in the first 16 cases?

A I did.

Q Did you file an amended pleading in the 17th case bringing in several hundred additional plaintiffs?

A I did.

Q What are your intentions about the plaintiffs in the first 16 cases?

A Those intentions are between those plaintiffs and their counsel, and I would assert, on their behalf, the attorney/client privilege respectfully, Your Honor.

Q Are you familiar with the local rules of practice?

A I am.

Q Are you familiar with the random filing of cases?

A I am.

Q Are you familiar with the Texas Rules of Civil Procedure?

A I am. Generally.

Q Are you familiar, for example, with rule number one of the Texas Rules of Civil Procedure which sets out the objective of the Rules of Civil Procedure being, among other things, a just, fair equitable and impartial adjudication of the rights of litigants?

A I am.

Q Is it your belief that your manner of filing these cases would be deemed to be impartial, not only by you, your cocounsel and your plaintiffs, but by opposing counsel and opposing defendants?

A I cannot speculate what type of label the defendants put on what we did, nor what type of label this court may choose to put on it. I can tell you that it was not my intention to affect the impartiality at all.

Q Are you familiar with Rule 3a of the Texas Rules of Civil Procedure which require the district courts of the various counties of Texas to adopt local rules?

A Yes, sir.

Q Are you familiar with Rule 13 of the Texas Rules of Civil Procedure which in effect says that the signature of attorneys or parties constitute a certificate by them that they've read the pleading, motion or other paper, and that the best of their knowledge information and belief formed after reasonable inquiry an instrument is not groundless and brought in bad faith?

A I am familiar with that.

Q Are you familiar with Rule 40, 41 and Rule 174 of the Texas Rules of Procedure that consider cases being

filed in different courts and the rights of the parties to move for consolidation of those cases?

A I am familiar with that rule.

Q Do you state that your procedure here did not impact the rights of the defendants to rely on that rule, if they wished to rely on that rule, in exercising a motion to consolidate if in fact you had not filed motions for non-suit?

A If I understand the question the answer is, no, it is not my obligation, as I do not represent those defendants, to assure that they are protected any rights under the rules. It's only my obligation to represent my clients under those same rules.

Q As an officer of the court do you feel any obligation whatsoever to comply with the spirit of the Texas Rules of Civil Procedure?

A As an officer of a court I feel my paramount obligation is to the children of Peru who are sick and some dead as a result of the defendants' actions. As an officer of the court, I also feel that if the rules of procedure are followed, then they are followed; if they are not followed, then they are not followed. I don't believe that the procedure is subject to spirit. It's either followed or not, and I believe they were followed here, Your Honor.

Q Did anyone – did you or anyone on your behalf have contact with the District Clerk of this county or the presiding judge of this county prior to entering into this filing process in determining how cases are assigned and

how that – how a case may be assigned to a particular court?

A Yes. We contacted the District Clerk's Office to determine how cases are filed in this county.

Q Who is we?

A My law partner.

Q And which law partner?

A Mr. Munoz

Q And who did he contact and when did he contact that person?

A The first part of your question's answer is Oscar Soliz. I do not know the second answer.

Q Was it well in advance of this filing process?

A It was in advance.

Q That's what I said, well in advance?

A I can't agree that it was well in advance.

Q All right. It was in advance. All right. Let me ask you, how many partners and employees are members of your law firm?

A At what time?

Q At the present time.

A Approximately – and you're talking only lawyers?

Q Lawyers –

A Yeah.

Q – associates, employees, secretaries, investigators.

A Probably 20.

Q All right. You have 20 people, either as partners or on the payroll, in some capacity for your law firm?

A I do.

Q In the cause in this court which you have non-suited, you represented several citizens of the republic of Peru. Is that correct?

A That is.

Q Were you prepared at the time you filed this suit, or at least immediately before you filed the suit, to diligently prosecute their causes of action?

A My intention as to my clients and the relationship they have with me, respectfully, Judge, is privileged, and I'm again going to assert the attorney/client privilege.

Q Are you going to state that your lawsuit was or was not filed in good faith?

A I will state that the lawsuit was filed in good faith.

Q Were you prepared at that time or any time prior thereto to diligently prosecute that case?

A Again, it's the same question, Judge. The way that I handle a case on behalf of a client, especially in this case, is a result of the attorney/client information which is subject to the attorney/client privilege.

Q Are you prepared in any of these cases, if remand occurs, to prosecute any of those cases?

A Would you please clarify which "these cases" mean?

Q Any of the 17 cases.

A I need a little more clarification. Are you speaking only on the cases that were nonsuited?

Q well, let's talk about the 17th case.

A Well – the one that –

Q Has been removed to federal district court. First of all, for the purpose of the record, a motion to remand is pending in the federal district court, is it not?

A Yes.

Q And that case may or may not be returned to the 105th District Court. Is that correct?

A It is correct.

Q And if it is returned, are you in a position to diligently prosecute that cause of action?

A I believe the answer to that question is yes.

Q And are you and your cocounsel prepared to expend the necessary funds to develop and try that lawsuit?

A We are.

Q And could you give the court some idea of what sum of money might be required in representing several hundred Peruvian citizens in litigating that case –

A I cannot.

Q – in a court in the United States?

A I cannot.

Q Can you give us any idea of how much money might be expended in bringing those several hundred plaintiffs to the United States for their cases?

A The only idea I can give you is that, unless these plaintiffs' cases come to the United States, these plaintiffs will not be plaintiffs against these defendants anywhere else in the world. I cannot give you anymore than that.

Q Is your firm and cocounsel willing to stipulate that you-all, if successful on remand, are in a position to spend some in excess, say, of $100,000 in the prosecution of these cases?

A Well, I mean, it's a speculative question, Judge, but we are prepared to proceed with what is necessary to represent them. I do not feel comfortable in giving you a baseline or a ceiling as to what that means. I don't know if the defendants, if the case is remanded and if it stays in the United States, are gonna make us spend a dime or make us spend however much.

Q When you say, "a dime," are you talking about 10 American cents?

A Figuratively.

Q Are you speaking figuratively?

A Figuratively.

Q Are you aware of any backlog of cases pending in the district courts of this county?

A I'm aware that every judge that I know in this county is concerned with keeping backlogs to a minimum.

Q Is it your understanding that because of the backlog it takes at least one year for a citizen of this state to get to trial in a jury case, generally speaking, in a district court in this county?

A It is not my understanding that justice in this county is limited to citizens of this state. It is my understanding that any person who, under the rules, brings a lawsuit rightfully in this county will get to trial within a year or under the Supreme Court mandate at least within 18 months.

Q Well, is it your experience that you can go to trial in this county in a district court case, for whomever you represent, in less than a year?

A Jury trial?

Q Yes, sir

A No, sir.

Q The court may consider financial sanctions against you, Mr. Hilliard. Would you care to testify as to your personal financial circumstances?

MR. BROWN: Your Honor, I'm gonna object, again, that the court, under the due process clause of the Texas and the United States Constitution, the court has asked a question directly indicating that the court is going to – contemplating sanctions, and that to require counsel to answer that question would require him to give evidence against himself, and we have not had

notice of the type and authority of the sanctions that the court intends or is contemplating entering. We urge that objection.

THE COURT: All right. Counsel, the court is merely giving him the opportunity to testify. The court's not going to require him to testify on his personal financial circumstances.

MR. BROWN: May I confer with my client for a moment?

THE COURT: Yes.

MR. BROWN: I'm through, Your Honor.

THE COURT: Excuse me?

MR. BROWN: I'm through conferring with counsel.

THE COURT: All right.

Q (By the Court) You care to respond or –

A My response is, number one, initially, if this court is acting impartially, my understanding of the rules and case law means that there will not be any sanctions imposed. Number two, if you're interested in how much sanctions I can pay, I'm gonna have to ask how much – what are you talking about, what type of sanctions are you considering?

Q Counsel, I'm merely giving you the opportunity to state what your financial circumstances – you testified as to a number of employees and law partners you have, and you don't have to answer if you don't want to. This is

your opportunity to testify to your financial circumstances.

A In order to determine whether or not I want to answer that question, I'm asking this court to clarify what types of sanctions it is considering.

THE COURT: All right. We'll move along.

All right. Mr. Brown, I'm gonna pass the witness to you.

MR. BROWN: May I confer with my client, Your Honor?

CROSS EXAMINATION

BY MR. BROWN:

Q Mr. Hilliard, in your actions that the court has taken judicial notice of here today, do you feel that you have violated the Rules of Civil Procedure or the local rules of Nueces County by your actions?

A I do not. There are no local rules, in reviewing those rules, that I'm aware of that have been violated by what we've done.

Q Was it your intention to violate the local rules?

A It was not. It was my intention to, within the rules, best represent these children of Peru.

Q Mr. Hilliard, are you aware of separate rules for the county courts at law of Nueces County?

A Yes, I am.

Q And do they have rules that perhaps speak of this but are not effective or applicable to the district courts?

A The county court rules specifically address this issue. The district court rules do not speak to this issue.

Q Is there any other statement you would like to make?

A All I would tell the court is, I am aware of the rules that the court asked me about. I am also aware of my primary responsibility to represent my clients zealously within those rules. I am also aware of the motto code of ethical responsibility Canon 9, and with the court's permission and judicial notice of that canon, the canon speaks to my duty to my client, which should never be subordinated merely because the full discharge of my obligation may be misunderstood or may tend to subject him or the legal profession to criticism. I am also aware of legal periodicals, specifically the *Harvard Law Review* case note entitled "Forum Shopping Reconsidered" that addresses the proper use of the rules to zealously represent one's client, and also, if the court would take judicial notice of this case note, says that to not follow a lawyer's professional responsibility in zealously representing my clients, that I may indeed subject myself to malpractice. I understand the court's concern as to these rules, but I do believe, Judge, that these rules weren't violated here, and I do believe that my responsibility is to operate within the rules as they exist to the [sic] best represent these folks.

THE COURT: All right. Would you care to further comment on the plaintiffs in the first 16 cases who apparently have now disappeared?

MR. HILLIARD: Again, Judge, I do not agree with the characterization of the court, and I believe that the relationship to those plaintiffs and the continued litigation is privileged by the attorney/client privilege.

THE COURT: All right. Anything further?

MR. BROWN: No, sir.

THE COURT: You may step down.

MR. HILLIARD: Would the court take judicial notice of Canon 9 of the motto standard of ethical consideration.

THE COURT: Court will take judicial notice of the standards for attorneys, yes, sir.

MR. HILLIARD: Thank you, Judge.

THE COURT: All the standards. All right. Mr. Schirrmeister, is it?

MR. SCHIRRMEISTER: Yes, Your Honor.

THE COURT: If you'll come forward, Mr. Schirrmeister.

MR. BROWN: Your Honor, before Mr. Schirrmeister comes forward, I'd like to again urge the objection that the court has indicated in the court's show cause order, that the court is contemplating sanctions against Mr. Hilliard and Mr. Schirrmeister individually, that they be permitted to exercise the right to not give evidence

against themselves in this proceeding under the Texas and the United States Constitution.

THE COURT: Objection's overruled.

THE COURT: Mr. Schirrmeister, you're an officer of the court. We're gonna waive the oath. You will be testifying as to the truth. You understand, your duty as an attorney and the oath you've taken as an attorney.

ANDREW SCHIRRMEISTER,

called as a witness by the Court, the oath having been waived by the Court, testified as follows, to-wit:

DIRECT EXAMINATION

BY THE COURT:

Q First of all, would you explain to the court your relationship to your cocounsel, Mr. Hilliard, his law firm, and to the several hundred plaintiffs in the 17 lawsuits, and particularly the named plaintiffs in Cause No. 95-4900-G.

A Mr. Hilliard and I are cocounsel for the plaintiffs in this case, Your Honor.

Q Do you jointly represent the various plaintiffs?

A Yes, Your Honor, we do.

Q Are you familiar with the Texas Rules of Civil Procedure?

A Yes, Your Honor, I am.

Q Are you familiar with the rule that requires district courts to have local rules?

A Yes, I am, Your Honor.

Q Before these cases were filed, were you aware of the requirement for random filing?

A I was aware, Your Honor, that – of the procedures for random filing in the Nueces County district courts, yes.

Q Are you familiar with rule number one of the Texas Rules of Civil Procedure which pertains to the impartial adjudication of the rights of litigants?

A Yes, Your Honor.

Q Are you familiar with Rule 13 of the Texas Rules of Procedure which in effect states that an attorney, before filing a pleading, must represent that that instrument is not groundless and brought in bad faith?

A Yes, Your Honor.

Q Are you familiar with Rule 40, 41 and 174 which applies to the consolidation and/or transfer of cases that may fall in different courts?

A Yes, Your Honor.

Q And the right of the attorneys on either side to make motion for that consolidation?

A Yes, Your Honor.

Q At this time do you still represent the plaintiffs named in Cause No. 95-4900-G in this court?

MR. BROWN: Your Honor, I'm gonna object that this plaintiffs – 95-4900-G is not plenied [sic] in this court, and also that that has – that has been nonsuited, and the plaintiffs are no longer plaintiffs in that case.

Q (By the Court) In any capacity, do you still represent Timoteo Aguilar Coaguila and Maria Magdalena Llanos individually and as next friend for Regman Aguilar Llanos, a minor?

A No, Your Honor.

Q You do not?

MR. HILLIARD: Excuse me, Judge? Just as cocounsel for Mr. Schirrmeister –

THE COURT: Now, wait just a minute How many cocounsel do we have here?

MR. HILLIARD: We have two lawyers.

THE COURT: Is Mr. Brown representing you gentlemen?

MR. HILLIARD: He is, but –

MR. BROWN: Representing –

MR. HILLIARD: But it's not Mr. Brown's responsibility to assert the attorney/client privilege between the lawyers that you have called in this court and their clients. As that lawyer – one of two lawyers that represents those clients, I object to the question and assert the attorney/client privilege.

THE COURT: Okay.

MR. BROWN: Your Honor, I represent them individually, not any of the plaintiffs, and I am not familiar with those aspects. I'm not privy to that information, and so, Mr. Hilliard must be able to make objections on that because I do not represent them.

Q (By the Court) All right. First of all, I think you answered question [sic].

THE COURT: Your objection is to strike that answer?

MR. SCHIRRMEISTER: I think, Your Honor, as Mr. Hilliard has testified, the relationship that we have between the plaintiffs in the nonsuited cases and the attorneys is subject to the attorney/client privilege. Respectfully decline to answer so.

Q (By the Court) All right. Let me ask you this: When you brought action as cocounsel on behalf of those plaintiffs for whom you have given notice of nonsuit, were you prepared, immediately prior to filing that petition, to prosecute that cause of action?

MR. HILLIARD: Same objection, Your Honor, attorney/client privilege.

Q (By the Court) Were you – that's your answer?

A Yes, Your Honor.

Q You're claiming the privilege?

MR. HILLIARD: Excuse me, Judge. It's not claiming the privilege, it's asserting it on behalf of the plaintiffs. The privilege is not waived as to other matters. It's nothing to do with the court's question. Has to do with the relationship between the clients and the attorneys.

Q (By the Court) Well, what the court wants to know is, when you filed that lawsuit, did you represent those people.

A Yes, Your Honor.

Q All right. And when you filed that lawsuit, were you prepared to prosecute their cause of action?

MR. HILLIARD: Same objection, Judge.

THE COURT: Your objection's overruled.

MR. SCHIRRMEISTER: Your Honor, with regard to the relationship between the clients whose claims have been nonsuited and ourselves, I believe that's subject to the attorney/client privilege and respectfully decline to answer.

Q (By the Court) Were you prepared to expend what reasonable sums of money necessary to represent those Peruvian citizens set out as plaintiffs in Cause No. 94-4900-G in their claim for damages against the 16 defendants named.

MR. BROWN: Your Honor, excuse me for interrupting. I'd like to confer with my client prior to answering that question.

THE COURT: All right. You may confer.

Q (By the Court) You wish to answer the –

A Would you repeat the question, Your Honor?

THE COURT: Court reporter will read the question back.

THE COURT REPORTER: "Were you prepared to expend what reasonable sums of money necessary to represent those Peruvian citizens in Cause No. 95-4900-G in their claim for damages against the 16 defendants named?"

MR. SCHIRRMEISTER: Yes, Your Honor. At the time we filed the lawsuit, it was originally in this court as well as in the other courts, we believe the plaintiffs had meritorious claims; they were injured, they did have a cause of action. We then nonsuited those claims. I believe the circumstances under which the nonsuits occurred and our relationship with those families now are the subject of the attorney/client privilege.

Q (By the Court) You filed that lawsuit in good faith?

A Yes, Your Honor.

Q What circumstance arose between the time you filed that lawsuit and the time you filed notice of nonsuit some six days later, I believe, that changed your feeling about that lawsuit?

A Your Honor, that again relates to the claiming attorney/client privilege on behalf of my clients.

Q Did you – did you file and dismiss this lawsuit with the intent of judge shopping to have it or other cases heard by a particular court in this county?

A And, Your Honor, with regard to the strategy that we did, I respectfully assert the attorney/client privilege on behalf of my clients.

Q Are you aware of any public statements made by any member of plaintiffs counsel that the process was used in order to get the case in a particular court that might have more expertise in the filing of class action lawsuits? Are you familiar with any such statement?

A Not with regard to class action lawsuits, Your Honor. I believe I'm familiar with the statements that you're referring to.

Q Was there any intention on your part to get it into any court, any of these cases in any court that you felt had more expertise or more experience?

A Again, Your Honor, I respectfully assert the attorney/client privilege on behalf of my clients.

Q This court, over objections, is considering financial sanctions against you as one of the named counsel. Do you wish to voluntarily give to your – give to this court the personal financial circumstances?

A Your Honor, [sic] respectfully decline to answer and have the same response as Mr. Hilliard.

Q Are you familiar with the backlog of cases that exist not only in this county but in most counties in this state?

A Yes, Your Honor, particularly familiar with Harris County where I practice.

Q Are you familiar with the fact that Nueces County, as Harris County, has limited judicial resources that must be properly used? Would you agree with that statement?

A I don't have personal knowledge of that, Your Honor, but I think it is characteristic of the counties and the judicial system in this state.

Q Would you assume that if you filed a case in this county that you would have to wait in turn for your case to come to trial?

A Yes, Your Honor.

Q Do you have anything else to say to this court?

A Yes, Your Honor. I don't believe that either Mr. Hilliard or ourselves intentionally violated any rules. We looked at the rules, Rule 3.1, and saw that it provides for consolidation in certain situations. We looked at the county court rules, which specifically address what occurred, and the absence of those rules in the district court led us to believe that we would have the right, in good faith, to proceed in the way that we did.

Q Well, what is your understanding of the standing order of the court for random filing. Doesn't your logic contradict the interpretation of the rules? In other words, why would – why would we have mandatory random filing if in fact one could file and dismiss or give notice of nonsuit any number of times?

A Your Honor, we abided by the random filing rules. We did file multiple cases, and there's nothing in the rules that says you cannot do what we did. There's a provision for consolidation back into an original court, but there's no prohibition against our conduct.

Q Well, let me ask you –

A The right –

Q Go ahead.

A The right to nonsuit under Rule 162, I believe, is absolute, and the remedy would be under Rule 3.1 for the defendants or the court, under certain circumstances, if the rule did apply, to consolidate back into its court. We did not believe even that that rule would apply.

Q Well, let me ask you, the rules concerning consolidation, do you think those rules are applied equally to plaintiffs and defendants, and that each side should have the opportunity to consider that right?

A I think the rules would provide for that, Your Honor, yes.

Q All right. Do you have anything else to say?

A No, Your Honor.

THE COURT: You may step down. Mr. Munoz, will you take the stand, please?

You're an officer of the court. You're sworn by State Bar rules. We're gonna waive the oath. I have a few questions to ask of you, Mr. Munoz.

MR. MUNOZ: Yes, sir.

JACOB MUNOZ,

called as a witness by the Court, the oath having been waived by the Court, testified as follows, to-wit:

DIRECT EXAMINATION

BY THE COURT:

Q Before these 17 cases were filed, did you have occasion to visit with any member of the District Clerk's staff to determine the process by which cases were filed?

A That's correct, Your Honor. Mr. Oscar Soliz.

Q Excuse me?

A I talked to Mr. Oscar Soliz.

Q You talked to the District Clerk?

A That's correct.

Q Mr. Oscar Soliz?

A Yes.

Q And were you familiar with the local rules for filing, on a random basis, cases in the district courts?

A I was generally familiar with the rules, that's correct.

Q And do you understand the concept and the importance of the random filing of cases?

A Generally speaking, yes. I'm not aware of any writings or opinions of anybody why they were done. I'm just kind of generally aware of random selection of cases and how it's done.

Q Well, do you feel that it would be fairer and have more appearance of propriety and impartiality if the filing attorney did not get to pick the court that his case was to be tried in? Do you agree with that proposition?

A Generally speaking, yes, Your Honor.

Q Did you contact any other court official prior to filing – prior to your firm filing these cases?

A No, Your Honor.

Q Concerning the filing process?

A Just Mr. Oscar Soliz.

Q All right. Do you have anything further to say?

A No, Your Honor.

MR. BROWN: No questions.

THE COURT: You may stand down.

All right. Mr. Brown, do you have anything that you would like to add to what has been elicited here before we get back to – first of all, let's get back to the District Clerk. Can you come forward, please, and –

MR. HILLIARD: To save time, Your Honor, if the court has the number, we'll stipulate to whatever it is to.

THE COURT: We'll make a record, Counsel.

CAROLYN SPANUTIUS,

recalled as a witness by the Court, having been first duly sworn by the Court, testified further, as follows, to-wit:

DIRECT EXAMINATION

BY THE COURT:

Q All right. Have you determined how many – how much has been expended in court costs in the 17 cases by the plaintiff's counsel?

A In each of the 17 cases they put up 161.50, which included the jury fee.

Q A total of approximately?

A We did not add it up. We just did the individual receipts.

Q Well, if my math is correct, would it be approximately $2,700.00?

A Yes, sir.

THE COURT: All right. Cross examination?

MR. BROWN: No questions.

THE COURT: All right. You may step down.

MR. BROWN: May I have a moment to confer with my client?

We have no additional evidence to present, Your Honor. We do have argument to present before the court makes any ruling.

THE COURT: All right. We're going to have about a 10-minute recess before we proceed. Anybody else have anything to offer on evidentiary points?

Counsel, you wish to be heard?

MR. RODRIGUEZ: No, sir, don't have any evidence to offer.

THE COURT: All right. Take about a 10-minute break.

(The Court stood in recess. After which, the following proceedings are had.)

THE COURT: Mr. Hilliard, I have an additional question to ask of you, and you can just testify from your seat there in view of your infirmity. Did you make a public statement of this matter – after this matter was reported in the news media that the filing process that you utilized was designed to get the case before a particular district judge who had more experience in cases such as this?

MR. HILLIARD: I think that the court and myself both made public statements concerning this matter, and, yes, I did make that statement.

THE COURT: And is that true?

MR. HILLIARD: It is true, and I would ask the court the same question as to the public statements this court made about its opinions as to this filing to the same press.

THE COURT: Well, unfortunately, I'm not on trial, and your viewpoint, Mr. Hilliard –

MR. HILLIARD: I didn't think I was, either.

THE COURT: If you'll take your seat. And you will show respect to this court, at least on this occasion.

All right. we'll hear closing argument.

MR. BROWN: Your Honor, we wanna [sic] make several objections to the court's contemplation of sanctions. I know some of these have been made. I wish to reiterate them and have additional objections. First of all, the court does not have jurisdiction of this case, and, therefore, does not have jurisdiction to sanction either of the plaintiffs' attorneys in this case because the court's plenary powers have expired. The cases were nonsuited on September 5th. A notice of nonsuit, as the case law clearly shows, under Rule 162, and in our written reply is effective immediately. The clerk testified that it was filed on September 5th, and it was entered in the minutes of the court. It is self-acting, does not require any order. Therefore, the court's attempt to abate the effect of the nonsuit did not act to keep jurisdiction in this court. It is more than 30 days since then, and our objection is the

court lacks jurisdiction to enter any type of sanctions in this particular case. Second objection is that to enter sanctions under the court's show cause order, that is, the order entitled "Sua Sponte Order Abating Dismissal and Setting Hearing on Transfer, Consolidation and Sanctions," to enter orders under that show cause order would violate the due process of law under the Fourteenth Amendment of the United States Constitution, and Article 1 Section 19 of the Texas Constitution, in that due process requires notice and a hearing. We have had inadequate notice of what the court intends to do. In fact, at this point in time we have no idea what type sanctions the court is imposing under what rules, what was violated. Due process has been defined various times. The court talked about inherent sanctions or inherent powers of the court. The case of *Kutch vs. Del Mar* from the Thirteenth Court, which we cited in the brief, although that has not been wholeheartedly adopted either by the Supreme Court or all of the courts of appeals, it has been cited numerous times, but every court that has approved of it, including the Thirteenth Court, has stated that due process limits those courts – the court's power even under that, so, if there is this inherent power that several of the courts of appeal have stated, then due process sometimes applies to that. We know from the contempt cases that due process applies, requires that the person – that the show cause order give precise knowledge of what the person has intended – has violated and what acts they have violated. There is language that states that the order that they're alleged to have violated must be clear and unambiguous so that the person knows exactly what can be done. We have a situation here that I believe

the court is contemplating sanctioning for a violation of random filing. The rules are susceptible to several interpretations. They are different in the county courts at law than they are in the district courts of Nueces County, and that may be an oversight of an administrative nature, but the fact is we are still left to wonder under what authority the court is making or contemplating sanctions, and we have failed to get notice of that. So, there has been no opposing side to file and present their evidence in pleadings, so, the only notice we have is the show cause order of October 2nd. To impose sanctions under that order would violate due process of law.

I would also like to ask the court, Mr. Hilliard would like to speak on behalf of himself, in closing argument.

THE COURT: Yes, sir. You can speak from where – you can speak from where you are.

MR. HILLIARD: Thanks, Judge. As a preamble, Judge Bennett, let me offer you my apology for that little bit of exchange that the court and I had. I did not mean to make this personal.

THE COURT: Isn't that what this whole thing is about, the respect of the citizenry for its courts and its judicial process?

MR. HILLIARD: I –

THE COURT: And as officers of the court and as citizens, ought not we be charged with upholding that respect? And in that spirit I accept your apology for the side-bar remark you made a moment ago.

MR. HILLIARD: And thanks, Judge. We ought to be charged with that responsibility, because that's

important to the system, but I think that ultimately the system only works if our first responsibility, before it's to the court, before it's to the press or before it's to other counsel, is to our clients, and my fear today is that you have brought me here to punish me for violating no rule. You've brought me here to punish me for, as best I can tell, the court's belief that the spirit of the rule has been tainted. As I told the court when I was testifying, it's not an easy thing – I know, if I go back to 13 years, I can remember specific cases that I've tried in front of you to a verdict, over half a dozen that I even thought of, and in every single one of those cases there was nothing but impartiality on your behalf. This is not about you, Your Honor, professionally, and it's not about me. It's about the rights of the plaintiffs in Peru to be represented by my firm as zealously as possible within the rules. If I don't do that, Judge, if I don't take those rules and use them to the benefit of those plaintiffs as best I can, then not only am I violating the motto code of professional responsibility that says it is not the criticism of other lawyers or of the public that has to be my concern, but of these kids in Peru that are seeking justice in American courts against American corporations. If you do what I know you're gonna do, you, I fear, will create a chilling effect on lawyers in this county who zealously want to represent their clients within the rules. I see what your position is. I disagree with it, and I don't think there is support for it. If the rule needs to be changed, it needs to be changed. If I am going to be punished, Judge Bennett, for not violating any rule, then the message seems to me is that lawyers who want to be in an adversarial system – and that's what the system is, adversarial, for lawyers

who want to stay within the rules but use those rules as best they can, to zealously represent their clients as best they can, they're not either gonna be able to do it or they're gonna think twice about doing it. Now, the proposal may be to change the rule, but it has to be at least a recommission that there was no rule violated here, and there is no sanction that should be assessed against me for representing these kids from Peru.

THE COURT: Do you agree or do you not agree that you would have the right to appeal from any ruling I made here today?

MR. HILLIARD: I agreed I'd have the right to appeal it, but –

THE COURT: Would you deny the defendants in this case that you filed in this court the right to have input and the right to appeal from the way you handled the filing and notice of nonsuit in this case?

MR. HILLIARD: My right to nonsuit is an absolute right. It has nothing to do with the rights of the defendants. If I decide anything on behalf of these kids, based on the rights of these defendants, then those plaintiffs can certainly sometime in the future question my ability to represent them.

THE COURT: Let me ask you, you refer to the kids of Peru. Are there also adult plaintiffs?

MR. HILLIARD: Both living and dead, mostly parents of the children.

THE COURT: All right. Thank you. Anything else?

MR. BROWN: Nothing further.

THE COURT: All right. Anything – anybody else wish to be heard on this matter?

MR. RODRIGUEZ: Your Honor, on behalf of the defendants I would like for the record to reflect that the defendants had no participation in the random selection of the filing, in which courts they fell, the cases fell in. The defendants had no opportunity to participate in litigation in this court when it was first filed because they were nonsuited from this court. I would only point out to the court that under the local rules there was a procedure whereby they could have accomplished what they wanted to by following the local rules, and that is, that if you feel that there's a case in another court that has been heard that is similar to the one that was before this court, they could have petitioned this court and that court to transfer it to that court. And the defendant's position is that what happened here is an abuse of the system, and that whatever the court's powers are, whatever the court does, the defendants feel very strongly that the system was abused, that the general public has a right to believe that the system will not be abused, and that there is no other way that it can be interpreted by the general public other than this was forum shopping, and the appearance that is given to the general public about what occurred here is serious. The defendants' rights were affected by not being allowed the opportunity to have this case tried that was filed against them in the court where it first fell. And that is the position of the defendants in this case.

MR. BROWN: May I reply briefly?

THE COURT: Yes, sir.

MR. BROWN: Your Honor, under the local rules, parties have the opportunity to file with the courts motions to consolidate and transfer. There are procedures for that set out. There are procedures for the local administrative judge to do that. The defendants were not deprived of any rights under those rules.

THE COURT: All right, gentlemen. The court, having considered the matters before it, makes the following order: The Court finds that the plaintiffs' attorneys, Robert Hilliard and Andrew Schirrmeister, have violated the rules of random filing in the district courts of this county that set in place a process to circumvent not only the rules but the spirit of the rules, that adversely affect the rights of the defendants. The court will make further more specific findings in its formal order which will encompass the evidence that was heard here today, and the court is going to enter the following sanction: Each of the named plaintiffs' counsel will pay unto the court the sum of $10,000 as a sanction for the misuse and abuse of the rules of this court. This sanction is directed only against plaintiffs' counsel and is directed against no party in either this court or any other court. Payment of those penalties will be due within 30 days of the signing and entry of the court's formal order. That order will be prepared first of the week. Counsel will be furnished with a copy of it.

There being no further proceedings, this court is adjourned.

(End of proceedings.)

APPENDIX E

Cause No. 95-4900-G

TIMOTEO AGUILAR COAGUILA AND MARIA MAGDALENA LLANOS INDIVIDUALLY AND AS NEXT FRIEND FOR REGMAN AGUILAR LLANOS, A MINOR;	)(	IN THE DISTRICT COURT
	)(	319th JUDICIAL DISTRICT
VS.	)(	
	)(	NUECES
SOUTHERN PERU COPPER CORPORATION, ASARCO, INC., CERRO TRADING CO., INC., CERRO SALES CORPORATION, THE MARMON CORPORATION, THE MARMON GROUP, INC., MARMON HOLDINGS, INC., GL CORPORATION, PHELPS DODGE OVERSEAS CAPITAL CORPORATION, PHELPS DODGE CORPORATION, PHELPS DODGE REFINING CORPORATION, PHELPS DODGE INDUSTRIES, INC., NEWMONT GOLD CORPORATION, NEWMONT MINING CORPORATION, INC., BILLITON B.V., AND MITSUI & CO., LTD.	)(	COUNTY, TEXAS

SUA SPONTE ORDER ABATING DISMISSAL AND SETTING HEARING ON TRANSFER, CONSOLIDATION AND SANCTIONS
(Filed Oct. 2, 1995)

On this 2nd day of October, 1995, this Court, acting under its inherent and plenary powers and duty, to preserve its jurisdiction and afford due process to litigants

and acting under the Rules of Practice of the District Courts of Nueces County, including Rule 3.1 and Rule 3.13, and the standing orders of the District Courts directing the random filing of cases in the District Court by the Clerk of the District Court, and under the Texas Rules of Civil Procedure Rule 41 and Rule 174, Rule 3a, Rule 1, and Rule 2 and others, and the Due Process Clause of the United States and Texas Constitution, makes the following findings and Order:

I

Findings

1. On August 30, 1995, at 3:24 p.m., this suit was filed with the District Clerk for the District Courts of Nueces County, Texas, and assigned by random computer selection to the 319th District Court pursuant to the Local Rules and standing order of the District Courts.

2. The District Clerk's Office was instructed not to prepare or issue service of citation by counsel for the plaintiffs. Between the filing of this suit at 3:24 p.m. on August 30, 1995, and 12:37 p.m. on August 31, 1995, an additional 13 suits were filed in six other Nueces County District Courts against the same named defendants alleging the same causes of action with each suit having five or fewer named plaintiffs. No citation or service of citation was requested by counsel for the plaintiffs in any of those cases.

3. On August 31, 1995, at 12:37 p.m. suit with several hundred named plaintiffs alleging the same causes of action against the same defendants was also filed with

the District Clerk and assigned by random computer selection to the 105th District Court under Cause No. 95-0446. The clerk of the court was instructed to prepare service of citation by counsel for the plaintiffs.

4. On September 5, 1995, "Plaintiff's Notice of Nonsuit" was filed in the 319th District Court and in all of the other District Courts except the 105th District Court.

5. No order of dismissal has been granted concerning the Plaintiff's Notice of Nonsuit.

6. No answer has yet been filed in any of the cases.

7. There appears to be noncompliance with the law as set out hereinabove;

8. The judge of this court was first informed of the filing of these suits and the "Notice of Nonsuit" on September 28 1995;

II

ORDER

It is therefore Ordered that, pending hearing hereon and subject to any pre-emptive order, if any, which may be made by the United States District Court:

(1) "Plaintiff's Notice of Nonsuit" and any dismissal by operation of law is abated

(2) Plaintiffs are noticed to appear and show just cause on the 10th day of November, 1995, at 1:30 p.m. why:

a. The cases filed in the other District Courts of Nueces County subsequent to

August 30, 1995, at 3:24 p.m. and having the same defendants and the same factual allegations of fault should not be transferred to and consolidated in this cause in the 319th Judicial District Court

b. Why plaintiff's counsel, as an officer of the court, should not be sanctioned for intentionally violating the Rules of the Court and standing orders of the District Courts of Nueces County.

(3) Counsel for the plaintiffs is Ordered to immediately furnish each of the named defendants at each address set out in the petition with a true copy of this order by United States Mail.

Signed and Ordered this 2nd day of October, 1995, at 9:20 a.m.

/s/ Max Bennett
Max Bennett
Judge, 319th Judicial District Court

APPENDIX F
TEXAS RULES OF CIVIL PROCEDURE

TRCP 1. OBJECTIVE OF RULES

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

TRCP 2. SCOPE OF RULES

These rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated. Where any statute in effect immediately prior to September 1, 1941 prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the "List of Repealed Statutes," such statute shall apply; and where any statute in effect immediately prior to September 1, 1941, and not included in the "List of Repealed Statutes," prescribed a rule of procedure in any special statutory proceeding differing from these rules, such statute shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in bond

or recognizance forfeitures in criminal cases are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in tax suits are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply; provided, however, that Rule 117a shall control with respect to citation in tax suits.

TRCP 3a. LOCAL RULES

Each administrative judicial region, district court, county court, county court at law, and probate court may make and amend local rules governing practice before such courts, provided:

(1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;

(2) no time period provided by these rules may be altered by local rules;

(3) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;

(4) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;

(5) all local rules or amendments adopted and approved in accordance herewith are made available upon request to members of the bar;

(6) no local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule 3a, shall ever be applied to determine the merits of any matter.

TRCP 41. MISJOINDER & NON-JOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

TRCP 174. CONSOLIDATION; SEPARATE TRIALS

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

RULE 330. RULES OF PRACTICE AND PROCEDURE IN CERTAIN DISTRICT COURTS

The following rules of practice and procedure shall govern and be followed in all civil actions in district courts in counties where the only district court of said county vested with civil jurisdiction, or all the district courts thereof having civil jurisdiction, have successive terms in said county throughout the year, without more than two days intervening between any of such terms, whether or not any one or more of such district courts include one or more other counties within its jurisdiction.

* * *

(e) Exchange and Transfer. Where in such county there are two or more district courts having civil jurisdiction, the judges of such courts may, in their discretion, exchange benches or districts from time to time, and may transfer cases and other proceedings from one court to another, and any of them may in his own courtroom try and determine any case or proceeding pending in another court without having the case transferred, or may sit in any other of said courts and there hear and determine any case there pending, and every judgment and order shall be entered in the minutes of the court in which the case is pending and at the time the judgment or order is rendered, and two (2) or more judges may try different cases in the same court at the same time, and each may occupy his own courtroom or the room of any other court. The judge of any such court may issue restraining orders and injunctions returnable to any other judge or court, and any judge may transfer any case or proceeding pending in his court to any other of said courts, and the judge of any court to which a case or proceeding is transferred shall receive and try the same, and in turn shall have power in his discretion to transfer any such case to any other of said courts and any other judge may in his courtroom try any case pending in any other of such courts.

* * *

TEXAS CONSTITUTION

§ 19. Deprivation of life, liberty, etc; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

APPENDIX G

CAUSE NO. 95-4900-G

TIMOTEO AGUILAR COAGUILA AND MARIA MAGDALENA LLANOS INDIVIDUALLY AND AS NEXT FRIEND FOR REGMAN AGUILAR LLANOS, A MINOR;	§	IN THE DISTRICT COURT
	§	319TH JUDICIAL DISTRICT
VS.	§	NUECES COUNTY, TEXAS
SOUTHERN PERU COPPER CORPORATION, ASARCO, INC., CERRO TRADING CO., INC., CERRO SALES CORPORATION, THE MARMON CORPORATION, THE MARMON GROUP, INC., MARMON HOLDINGS, INC., GL CORPORATION, PHELPS DODGE OVERSEAS CAPITAL CORPORATION, PHELPS DODGE CORPORATION, PHELPS DODGE REFINING CORPORATION, PHELPS DODGE INDUSTRIES, INC., NEWMONT GOLD CORPORATION, NEWMONT MINING CORPORATION, INC., BILLITON B.V., AND MITSUI & CO., LTD.	§	

REPLY OF PLAINTIFF'S ATTORNEYS TO SUA SPONTE ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Robert C. Hilliard and Andrew C. Schirrmeister, III, (herein after referred to as Plaintiff's

attorneys) in the above styled and numbered cause, by and through their attorney, Eric Brown, and files this their Reply to a Portion of the Court's Order of October 2, 1995, and entitled SUA SPONTE ORDER ABATING DISMISSAL AND SETTING HEARING ON TRANSFER, CONSOLIDATION AND SANCTIONS. This reply is filed to that portion of the above Court's Order in sec. II (2)b, which states:

> "It is therefore ordered, pending hearing hereon and subject to any preemptive order, if any, which may be made by the United States District Court:
>
> (2) Plaintiffs are noticed to appear and show just cause on the 10th day of November, 1995, at 1:30 p.m.
>
> b. Why plaintiff's counsel, as an officer of the Court, should not be sanctioned for intentionally violating the Rules of the Court and standing orders of the District Courts of Nueces County."

In reply to said order, Plaintiff's counsel would respectfully show unto the Court as follows:

1.

Lack of Jurisdiction

The above entitled and numbered cause was non-suited on September 5, 1995 by Plaintiff's counsel filing a Notice of Non-Suit. On October 2, 1995, the Court entered a Sua Sponte Order attempting to abate the Plaintiff's non-suit in this cause.

Rule 162 of the Texas Rules of Civil Procedure provide that at any time before the Plaintiff has introduced all of his evidence, other than rebuttal evidence, he may dismiss a case, or take a non-suit. In *Ventura v. Banales,* No. 13-95-224-CV (Tex.App. – Corpus Christi, August 17, 1995), the court stated:

> "In Texas, the plaintiff has an absolute right to take a non-suit at any time before he has introduced all of his evidence. A plaintiff's right to dismiss his suit exists from the moment a written motion is filed or an oral motion is made in open court, unless the defendant has, prior to that time, filed pleadings seeking affirmative relief."

Greenburg v. Brookshire, 640 S.W.2d 870 (Tex. 1982). If a defendant has not made a claim for affirmative relief, the plaintiff's right to take a non-suit is unqualified and absolute. *BPH Petroleum Company v. Millard,* 800 S.W. 838 (Tex. 1990).

Plaintiffs' nonsuit was effective at the time it was filed on September 5, 1995. "The nonsuit or dismissal is effective at the time it is filed . . . signing of an order granting it is purely ministerial." *In the Matter of R.G., Jr., a Child,* 865 S.W.2d 504, 508 (Tex. App. – Corpus Christi 1993, no writ). As the Court stated in *Strawder v. Thomas,* 846 S.W.2d 51, 59 (Tex. App. – Corpus Christi 1992, no writ):

> The case law surrounding Rule 162 clearly reflects that taking of a nonsuit does not necessitate the filing of any other pleadings or observing other technical rules, but merely requires the appearance before the court or clerk by a plaintiff . . . through its representative or attorney,

> and the transmittal to the clerk of the party's abandoning its claims. *No particular procedure is required to take a nonsuit.* The Supreme Court has held that the rule is to be liberally construed in favor of the right to nonsuit, and that it should not be given strict or technical construction.
>
> . . .
>
> The Texas courts have uniformly held that presentation to the court of a nonsuit in some fashion and entry of that presentation upon the court's calendar ends the case with regard to any claims involving that party, except for claims for affirmative relief then pending against the nonsuiting party; no order ever need be entered.

Id. (emphasis added).

Since no motions for sanctions were pending on September 5, 1995, the trial court was without jurisdiction to issue its Sua Sponte Order for Plaintiff's attorneys to appear and show cause why they should not be sanctioned.

2.

Due Process of Law

This Court's Order to Plaintiff's attorneys to show cause why sanctions should not be imposed violates their rights of due process of law under the 5th and 14th Amendments of the United States Constitution and Article 1, § 19 of the Texas Constitution. The Texas Supreme Court has stated that due process of law demands that full and complete notification of the subject matter, and the Show Cause Order or other means of notification

must state when, how, and by what means the Defendant has been guilty of the alleged contempt. Where there is indirect contempt (contempt committed outside the presence of the court), any contempt judgment or order must be based on a valid Show Cause Order or equivalent legal process that contains full and unambiguous notification of the accusation of contempt. *Ex parte Blanchard,* 736 S.W.2d 642 (Tex. 1987).

For a person to be held in contempt for disobeying a court order, the order must spell out the details of compliance in clear, specific, and unambiguous language so that the person will readily know exactly what duties and obligations are imposed upon him. Interpretation of the provisions of the court order in question should not rest upon implication or conjecture. *Ex parte Blasingame,* 748 S.W.2d 444 (Tex. 1988). Stated another way, the contemptuous acts alleged must be directly contrary to the express terms of the court order. When a court seeks to punish by fine, arrest, or imprisonment for disobedience of an order, that order must carry no uncertainty and must not be susceptible of different meanings or constructions. *Ex parte Kraus.* 863 S.W.2d 104 (Tex.App. – Corpus Christi, 1993).

3.

Ambiguity of Order

The court's order in question cites Rule 3.1 and Rule 3.13 of the Local Rules of Administration adopted by the District Judges of Nueces County. Rule 3.1 provides that after a case is assigned by the Clerk to a particular court, it remains in such court until final disposition or transfer.

It also provides that cases may be transferred from one court to another with the consent of both judges or by order of the local administrative judge. The rule further provides that when one pending case is so related to another case pending in or disposed of by another court of the county, that, after motion and notice, it may be transferred to the court in which the earlier case was filed. Rule 3.13 provides the procedure for the filing and hearing of motions to consolidate in the court in which the first case filed is pending.

The trial court's order of October 2, 1995 is vague and ambiguous and fails to apprise Plaintiff's attorneys of the act or acts alleged to be an intentional violation of the local rules of the District Courts of Nueces County. The order is further ambiguous in that it fails to apprise Plaintiff's counsel of the nature of the sanctions which the Court proposes to sua sponte impose. It is not possible by reading the court's Sua Sponte Order to understand what possible sanctions may be contemplated by the court. It is likewise not possible to understand the possible sanctions for allegedly violating the local rules of Nueces County in that those rules speak nowhere of sanctions or penalties.

4.

General Sanction Authority

The Thirteenth Court of Appeals has held that Texas courts have inherent power to sanction for abuse of the judicial process which may not be covered by rule or statute. This power includes the power to sanction appropriately for failure to comply with a valid court order

incident to one of the core functions of the judiciary. They listed these core functions as hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgment and enforcing the judgment. *Kutch v. Del Mar College*, 831 S.W.2d 506 (Tex.App. – Corpus Christi, 1992). While the Corpus Christi Court has followed its own rule in subsequent cases, see *Ricardo N., Inc. v. Turcios de Argueta*, 870 S.W. 2d 95 (Tex.App. – Corpus Christi, 1993), the Waco Court of Appeals has declined to adopt the sweeping language enunciated in *Kutch, supra. Shook v. Gilmore & Tatge Mfg. Co.*, 851 S.W.2d 887 (Tex.App. – Waco, 1993).

In *Remington Arms Company, Inc. v. Caldwell*, 850 S.W.2d 167 (Tex. 1993), the Supreme Court held that a Sanction Order against the Defendant did not result from discovery misconduct and was therefore not authorized by Rule 215, Tex.R.Civ.Pro. The Supreme Court noted that trial courts have comprehensive inherent and statutory power to discipline errant counsel for improper trial conduct in the exercise of its contempt power but did not expand this inherent power to generalize sanctions. This was recognized by the Waco Court of Appeals in *Shook v. Gilmore & Tatge Mfg. Co., supra,* when that court declined to wholeheartedly embrace the Corpus Christi Court of Appeals ruling in *Kutch, supra.* The Waco Court recognized that the Texas Supreme Court had never recognized the inherent power of Texas courts, absent the violation of a rule or pretrial order, to sanction a party's bad faith conduct during litigation. The *Remington Arms Company* case recognized the trial court's comprehensive inherent and statutory power to discipline counsel for improper trial conduct but not a general authority to sanction.

The recitation of events in the Court's sua sponte order do not allege facts concerning discovery or conduct at trial. It shows that Plaintiff's counsel filed several lawsuits with different party plaintiffs and each case was randomly assigned to a court by the clerk according to the local rules. The filing of a Notice of Non-suit is permitted by the rules. No rule, local or otherwise was violated.

For the reasons stated, the Court should dissolve its Show Cause Order set for hearing on November 10, 1995, or in the alternative, not impose any sua sponte sanctions against Plaintiff's counsel in that the Court is without jurisdiction to hear the matter, and/or such sanctions would violate due process of law under the United States and Texas Constitutions.

Respectfully submitted,

BRIN & BRIN, P.C.
1202 Third Street
Corpus Christi, TX 78404
(512) 881-9643
(512) 883-0506 Facsimile

BY /s/ Eric G. Brown
ERIC G. BROWN
State Bar No. 03120500
ATTORNEYS FOR
ROBERT C. HILLIARD AND
ANDREW C. SCHIRRMEISTER, III

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing **Reply of Plaintiff's Attorneys to Sua Sponte Order** has been provided to:

Honorable Judge Max Bennett
319th Judicial District Court
Nueces County Courthouse
901 Leopard Street
Corpus Christi, Texas 78401

Mr. Eduardo Roberto Rodriguez
Joseph A. (Tony) Rodriguez
RODRIGUEZ, COLIN & CHANEY
1201 East Van Buren Street
Brownsville, Texas 78520

Mr. Andrew Schirrmeister, III
ZUMMO & SCHIRRMEISTER
2603 Augusta, Suite 1200
Houston, Texas 77057

Mr. Robert C. Hilliard
HILLIARD & MUNOZ, P.L.L.C.
719 South Shoreline, Suite 600
Corpus Christi, Texas 78401

via Certified Mail, Return Receipt Requested, on this the 7th day of November, 1995.

/s/ Eric Brown
ERIC BROWN

APPENDIX H

Cause No. 95-4900-G

TIMOTEO AGUILAR COAGUILA AND MARIA MAGDALENA LLANOS INDIVIDUALLY AND AS NEXT FRIEND FOR REGMAN AGUILAR LLANOS, A MINOR;	)(	IN THE DISTRICT COURT
VS.	)(	319th JUDICIAL DISTRICT
SOUTHERN PERU COPPER CORPORATION, ASARCO, INC., CERRO TRADING CO., INC., CERRO SALES CORPORATION, THE MARMON CORPORATION, THE MARMON GROUP, INC., MARMON HOLDINGS, INC., GL CORPORATION, PHELPS DODGE OVERSEAS CAPITAL CORPORATION, PHELPS DODGE CORPORATION, PHELPS DODGE REFINING CORPORATION, PHELPS DODGE INDUSTRIES, INC., NEWMONT GOLD CORPORATION, NEWMONT MINING CORPORATION, INC., BILLITON B.V., AND MITSUI & CO., LTD.	)(	NUECES COUNTY, TEXAS

ORDER ON SANCTION OF ATTORNEYS

(Filed Jan. 4, 1996)

On the 10th day of November, 1995, came on to be heard the court's own motion for sanctions against the plaintiffs' attorneys;

And plaintiffs' attorneys Robert C. Hilliard and Andrew C. Schirrmeister, III appeared personally and through counsel, testified and made argument;

And defendants' attorney, Eduardo Roberto Rodriguez, appeared and made argument;

And the court, having taken up only the matter of sanctions against the attorneys, makes the following findings and orders:

Findings

1. On August 30, 1995, at 3:24 p.m., this suit was filed under this cause number with the District Clerk of Nueces County, Texas, and assigned, at random, and pursuant to the local rules of court approved by the Texas Supreme Court, to this court. The petition alleges injuries to the plaintiffs, who are citizens of the Republic of Peru, allegedly caused by the defendants as a result of copper mining operations within the Republic of Peru.

2. The clerk was instructed not to prepare citation for service on the defendants.

3. Immediately after the filing of this suit, attorneys for the plaintiffs filed an additional fifteen suits, each with fewer than five plaintiffs, citizens of Peru, against the same defendants and making the same allegations of damages and same allegations of wrongful acts. Those cases were filed and assigned at random as follows:

Filing date and time: August 30, 1995; 3:30 p.m.
Cause No. 95-4901-A
28th Judicial District Court
Andia, et al vs. Southern Peru Copper Company, et al

Filing date and time: August 30, 1995; 3:38 p.m.
Cause No. 95-4902-F
214th Judicial District Court
Mamani, et al vs. Southern Peru Copper Company, et al

Filing date and time: August 30, 1995; 3:43 p.m.
Cause No. 95-4905-B
117th Judicial District Court
Mayta vs. Southern Peru Copper Company, et al

Filing date and time: August 30, 1995; 3:46 p.m.
Cause No. 95-4906-B
117th Judicial District Court
Huiso, et al vs. Southern Peru Copper Company, et al

Filing date and time: August 30, 1995; 3:50 p.m.
Cause No. 95-4908-F
214th Judicial District Court
Vargas vs. Southern Peru Copper Company, et al

Filing date and time: August 30, 1995; 3:53 p.m.
Cause No. 95-4909-E
148th Judicial District Court
Aguilar vs. Southern Peru Copper Company, et al

Filing date and time: August 30, 1995; 3:57 p.m.
Cause No. 95-4910-C
94th Judicial District Court
Turpo, et al vs. Southern Peru Copper Company, et al

Filing date and time: August 31, 1995; 11:14 a.m.
Cause No. 95-4936-A
28th Judicial District Court
Montoya, et al vs. Southern Peru Copper Company, et al

Filing date and time: August 31, 1995; 11:18 a.m.
Cause No. 95-4937-C
94th Judicial District Court
Marcelo, et al vs. Southern Peru Copper Company, et al

Filing date and time: August 31, 1995; 11:24 a.m.
Cause No. 95-4938-A
28th Judicial District Court
Cunchaya, et al vs. Southern Peru Copper Company, et al

Filing date and time: August 31, 1995; 11:27 a.m.
Cause No. 95-4939-A
28th Judicial District Court
Espinoza vs. Southern Peru Copper Company, et al

Filing date and time: August 31, 1995; 12:15 p.m.
Cause No. 95-4942-E
148th Judicial District Court
Puma, et al vs. Southern Peru Copper Company, et al

Filing date and time: August 31, 1995; 12:21 p.m.
Cause No. 95-4943-H
347th Judicial District Court
Cayo, et al vs. Southern Peru Copper Company, et al

Filing date and time: August 31, 1995; 12:25 p.m.
Cause No. 95-4944-E
148th Judicial District Court
Fernandez, et al vs. Southern Peru Copper Company, et al

Filing date and time: August 31, 1995; 12:31 p.m.
Cause No. 95-4945-C
94th Judicial District Court
De Castro, et al vs. Southern Peru Copper Company, et al

4. The clerk of the court was instructed not to prepare citation for service in those fifteen cases.

5. Seven minutes after the filing of Cause No. 95-4945-C, plaintiffs' counsel filed the following case with four plaintiffs, making the same allegations of alleged injury and alleged wrongful acts and omissions by the same defendants, and that case was randomly assigned to the 105th Judicial District Court:

Filing date and time: August 31, 1995; 12:37 p.m.
Cause No. 95-4946-D
105th Judicial District Court
Torres, et al vs. Southern Peru Copper Company, et al

6. Two hours later, at 2:31 p.m., on August 31, 1995, plaintiffs' attorneys filed Plaintiffs' First Amended Petition in Cause No. 95-4946-D, in the 105th Judicial District Court, *adding several hundred plaintiffs.*

7. The clerk was instructed to issue citation for service on the defendants of Plaintiffs' First Amended Petition in Cause No. 95-4946-D, in the 105th Judicial District Court, and service was effected.

8. On September 5, 1995, "Plaintiffs' Notice of Nonsuit" was filed by plaintiffs' attorneys in all of the cases except Cause No. 95-4946-D, in the 105th Judicial District Court.

9. No order of dismissal was made by the court in Cause No. 95-4900-G, Coaguila, et al vs. Southern Peru Copper Company, the 319th Judicial District Court.

10. The plaintiffs in the first sixteen cases filed by plaintiffs' counsel are not named as plaintiffs in Cause No. 95-4946-D, in the 105th Judicial District Court, in either the Original or Amended Petition.

11. On October 2, 1995, this court made its "Sua Sponte Order Abating Dismissal and Setting Hearing on Transfer, Consolidation and Sanctions."

12. On November 2, 1995, the Court of Appeals for the Thirteenth District of Texas denied plaintiffs' attorneys' Motion for Leave to File Petition for Writ of Mandamus in No. 13-95-472-CV. Robert C. Hilliard and Andrew C. Schirrmeister, III, Relators vs. The Honorable Max Bennett, Judge of the 319th Judicial District Court, Nueces County, Texas, Respondent.

13. Attorneys Hilliard and Schirrmeister knowingly and intentionally:

a. violated the Local Rules of Practice of the district courts of Nueces County, Texas, which provide for random assignment of cases, in that they set in motion a scheme to have their cases tried before a particular judge in a particular court;

b. violated Local Rules of Practice and the Texas Rules of Civil Procedure in that by filing notices of nonsuit, they deprived or attempted to deprive the defendants of their rights to present or defend a motion to

transfer or consolidate all of the cases in a particular court;

c. violated Rule 13, TRCP, in that they filed this case in bad faith, solely as part of a scheme to have the causes of action of several hundred plaintiffs heard before a particular, and other, court;

d. violated Rule 1, TRCP, in that they attempted, through a scheme, to reserve exclusively unto themselves the right to have their case, with several hundred plaintiffs, heard in a particular court, notwithstanding Rule 1 which requires a "just, fair, equitable and impartial adjudication of the rights of litigants;" this objective, of necessity, requiring compliance with random-filing local rules.

14. Attorney Robert C. Hilliard admitted during the hearing on sanctions that he made a statement to a news reporter, and the statement was true, that the filing process he used was designed to get the case before a particular judge.

15. Defendants, during the hearing on November 10, 1995, made objections to the actions of plaintiffs' attorneys, stating that such actions were an abuse of the system, constituted forum shopping, and adversely affected the rights of the defendants.

ORDER

The court, therefore, in the exercise of its statutory, common law and inherent powers and jurisdiction, and its duty to provide just, fair, equitable and impartial adjudication of the rights of litigants coming before the

court, plaintiffs and defendants alike, and to preserve and protect such core functions as it is vested with, and to discourage for all of these reasons the acts of the plaintiffs' attorneys in their attempt to select a particular court, a practice commonly referred to as "judge shopping and "forum shopping;"

hereby Orders attorney Robert C. Hilliard and attorney Andrew C. Schirrmesiter [sic], III, as a sanction, each to pay unto the clerk of the court the sum of $10,000 on or before February 5, 1996; otherwise, let execution or further sanctions, on notice, be issued.

Signed and entered this 4 day of January, 1996.

/s/ Max Bennett
Max Bennett
Judge

APPENDIX I

NO. ___

COURT OF APPEALS

FOR THE THIRTEENTH DISTRICT OF TEXAS

AT CORPUS CHRISTI

ROBERT C. HILLIARD AND
ANDREW C. SCHIRRMEISTER, III

RELATORS

VS.

THE HONORABLE MAX BENNETT, JUDGE OF THE
319TH JUDICIAL DISTRICT COURT,
NUECES COUNTY, TEXAS,

RESPONDENT

FROM THE DISTRICT COURT OF
NUECES COUNTY, TEXAS, 319TH JUDICIAL DISTRICT

PETITION FOR WRIT OF MANDAMUS, BRIEF, AND RECORD IN SUPPORT OF THE PETITION

ATTORNEYS FOR RELATORS

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State Bar No. 03120500
LINDA C. BRECK
State Bar No. 02938600

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(512) 883-0506 (Fax)

NO. _____

ROBERT C. HILLIARD AND
ANDREW C. SCHIRRMEISTER, III

RELATORS

VS.

THE HONORABLE MAX BENNETT, JUDGE OF THE
319TH JUDICIAL DISTRICT COURT,
NUECES COUNTY, TEXAS,

RESPONDENT

CERTIFICATE OF PARTIES AND ATTORNEYS

In order that the members of this Court may determine disqualification and recusal under Texas Rules of Appellate Procedure 15 and 15a, Relator certifies that the following is a complete list of the parties, attorneys, and other persons who may have a financial interest in the outcome of this proceeding:

RELATORS

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RESPONDENT

[1]Honorable Max Bennett
319th District Court of Texas
Nueces County Courthouse
Corpus Christi, Texas 78401

---

[1] The defendants in the original case are not parties to this application for writ of mandamus because the action complained of was taken by the Respondent *sua sponte* and not solely at the instance of the defendants.

NO. _____

ROBERT C. HILLIARD AND
ANDREW C. SCHIRRMIESTER [sic], III

RELATORS

VS.

THE HONORABLE MAX BENNETT, JUDGE OF THE
319TH JUDICIAL DISTRICT COURT,
NUECES COUNTY, TEXAS,

RESPONDENT

Relators request immediate relief pursuant to Tex. R. App. P. 121(c) without oral argument, or alternatively, immediate temporary relief pursuant to Tex. R. App. P. 121(d) and subsequent oral argument.

RECORD AND RECORD REFERENCES

In support of the petition, Relator files sworn copies of the Order complained of and other relevant exhibits as follows:

Exhibit A – Order on Sanction of Attorneys Dated January 4, 1996.

Exhibit B – Plaintiffs' Original Petition in No. 95-4900-G, *Timoteo Aguilar Coaguila and Maria Magdalene Llanos, Individually and as Next Friend for Regman Aguilar Llanos, a Minor vs. Southern Peru Copper Corporation, et al.*, 319th Judicial District Court, Nueces County, Texas

Exhibit C – Plaintiffs' Notice of Nonsuit in No. 95-4900-G, *Timoteo Aguilar Coaguila*

and Maria Magdalene Llanos, Individually and as Next Friend for Regman Aguilar Llanos, a Minor vs. Southern Peru Copper Corporation, et al., 319th Judicial District Court, Nueces County, Texas

Exhibit D – *Sua Sponte* Order Abating Dismissal and Setting Hearing on Transfer, Consolidation and Sanctions, dated October 2, 1995.

Exhibit E – Statement of Facts of Hearing on Motion for Sanctions dated November 10, 1995.

Exhibit F – Reply of Plaintiff's Attorneys to Sua Sponte Order.

Exhibit G – Local Rules of the District Courts of Nueces County, Texas

Exhibit H – Local Rules of the County Courts at Law of Nueces County, Texas

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NO. _____

IN THE

COURT OF APPEALS

FOR THE THIRTEENTH DISTRICT OF TEXAS

AT CORPUS CHRISTI

ROBERT C. HILLIARD AND
ANDREW C. SCHIRRMEISTER, III

REALTORS

VS.

THE HONORABLE MAX BENNETT, JUDGE OF THE
319TH JUDICIAL DISTRICT COURT,
NUECES COUNTY, TEXAS,

RESPONDENT

FROM THE DISTRICT COURT OF
NUECES COUNTY, TEXAS, 319TH JUDICIAL DISTRICT

PETITION FOR WRIT OF MANDAMUS AND BRIEF IN SUPPORT OF THE PETITION

Relators Robert C. Hilliard and Andrew C. Schirrmeister, III ("Relators") petition this Court for a writ of mandamus directing Respondent, the Honorable Max Bennett, Judge of the 319th Judicial District, Nueces County, Texas, to vacate his January 4, 1996 Order On Sanction of Attorneys.

THE PARTIES

Relators are the attorneys who, prior to a nonsuit, were representing Timoteo Aguilar Coaguila and Maria Magdalene Llanos, Individually and as Next Friend for Regman Aguilar Llanos, a Minor, in No. 95-4900-G, *Timoteo Aguilar Coaguila and Maria Magdalene Llanos, Individually and as Next Friend for Regman Aguilar Llanos, a Minor vs. Southern Peru Copper Corporation, et al.*, filed in the 319th Judicial District Court, Nueces County, Texas.

Relators' addresses and telephone numbers are:

Robert C. Hilliard
Hilliard & Munoz
719 South Shoreline, Suite 600
Corpus Christi, Texas 78401
(512) 882-1612
(512) 882-3015 (fax)

Andrew C. Schirrmeister, III
Zummo & Schirrmeister, L.L.P.
2603 Augusta, Suite 1200
Houston, Texas 77057
(713) 781-0771
(713) 781-0776 (fax)

Respondent is the trial court judge, the Honorable Max Bennett, 319th Judicial District court, Nueces County, Texas, who signed the Order at issue. Respondent's address is:

Honorable Max Bennett
319th District Court of Texas
Nueces County Courthouse
901 Leopard
Corpus Christi, Texas 87401

I. STATEMENT OF THE ISSUES

The issues before the Court are:

(1) Whether Respondent may impose sanctions on Relators in a case after the case has been dismissed and the court has lost its jurisdiction.

(2) Whether Respondent abused its discretion in granting sanctions under Texas Rules of Civil Procedure 1 and 13, or the local rules of the district courts of Nueces County.

II. STATEMENT OF FACTS

A. The Underlying Case

This case was a personal injury action brought by three individuals who were harmed by emissions from the original defendants' copper smelting operations in Ilo, Peru. The plaintiffs were seeking monetary damages to compensate them for their injuries.

B. Events Leading to Respondent's Order

The order at issue in this Original Proceeding is Respondent's Order on Sanction of Attorneys dated January 4, 1996 (Exhibit A). Respondent's order makes findings that Relators violated the Local Rules of Practice of the district courts of Nueces County, Texas, the Texas Rules of Civil Procedure, specifically Rules 1 and 13. The Respondent orders Relators, as sanctions, to pay to the clerk of the court the sum of $10,000.00 each by February 5, 1996.

On August 30, 1995, plaintiffs' counsel, Hilliard & Munoz and Zummo & Schirrmeister, filed a lawsuit, which was assigned to Respondent's court by the District Clerk. On the same day and on August 31, 1995, the same lawyers filed sixteen other lawsuits, each involving different plaintiffs. On September 5, 1995, each plaintiff filed a Notice of Nonsuit and abandoned his/her claims except the plaintiffs in the case pending in the 105th district court. The plaintiffs in the lawsuit filed in Respondent's Court and the other plaintiffs who nonsuited and abandoned their claims are not plaintiffs in the action filed in the 105th District Court.

On October 2, 1995, Respondent entered a *sua sponte* order that attempted to abate plaintiffs' nonsuit previously filed in Respondent's court and the nonsuits by other plaintiffs in other courts. In that order, Respondent also commanded Relators to appear and show cause why:

> The cases filed in the other District Courts of Nueces County subsequent to August 30, 1995, at 3:24 p.m. and having the same defendants and the same factual allegations of fault should

not be transferred to and consolidated in this cause in the 319th Judicial District Court; and

Why plaintiff's counsel, as an officer of the court, should not be sanctioned for intentionally violating the Rules of the Court and standing orders of the District Courts of Nueces County.

Once the defendants learned about the cases that Relators filed and nonsuited, the defendants removed the dismissed cases to the United States District Court for the Southern District of Texas. Following their removal Plaintiffs filed notices of prior non-suit or in the alternative Fed. R. Civ. P. 41(a), Notice of Dismissal.

Prior to the hearing on Respondent's sua sponte motion, Relators, on behalf of their clients, filed a Petition for Writ of Mandamus against the Respondent. In the mandamus action, Relators' claimed that the trial court was without authority to abate a voluntarily dismissed case. This Petition was styled *Timiteo Aguilar Coaguila and Maria Magdalena Llanos, Individually and as Next Friend for Regman Aguilar Llanos, a minor vs. The Honorable Max Bennett Judge of the 319th Judicial District Court, Nueces County, Texas;* Cause No. 13-95-00473-CV. On November 2, 1995 this Court granted Relators' Motion for Leave to File Petition for Writ of Mandamus. The proceeding has not been set for oral argument and remains pending before this Court.

Likewise, on the same day, Relators filed a Petition for Writ of Mandamus on the ground that they were required to appear in a case over which Respondent has no jurisdiction. This Petition for Writ of Mandamus was styled *Robert C. Hillard and Andrew C. Schirrmeister, III, v.*

The Honorable Max Bennett, Judge of the 319th Judicial District Court, Nueces County, Texas; Cause No. 13-95-00472-CV. On November 2, 1995, this Court denied Relators' Motion for Leave to File Motion for Writ of Mandamus.

Respondent, in addition to ordering Relators to appear in a dismissed case over which Respondent retained no jurisdiction, has now ordered sanctions against Relators in a cause over which Respondent has no jurisdiction.

III. RELIEF SOUGHT AND ARGUMENT

A. The Trial Court Had No Jurisdiction Over the Case

Relators seek a writ of mandamus from this Court to direct Respondent to vacate his January 4, 1996 Order On Sanctions Of Attorneys because the court has lost its jurisdiction to act in the case. The Respondent's Order clearly indicates that it was entered in the dismissed cause. Because the Court's January 4, 1996, order was entered in a dismissed case after the court lost jurisdiction, the order is void. Mandamus is the proper method by which to attack a void judgment or order. *Thomas v. Miller*, 906 S.W.2d 260, 262 (Tex.App. – Texarkana 1995, orig. proceeding).

The underlying case was filed with the District Clerk of Nueces County on August 30, 1995. On September 5, 1995, plaintiffs took a nonsuit of this action. At the time, plaintiffs took their nonsuit in this cause, no defendant had a claim for affirmative relief nor were any motions for sanctions by anyone pending at that time. The nonsuit

was effective at the moment it was filed and effects an immediate dismissal of the entire lawsuit. *Miller v. Armogida*, 877 S.W.2d 361 (Tex. App. – Houston [1st Dist.] 1994, writ denied). In the absence of a claim by a defendant for affirmative relief or sanctions, a trial court's refusal to grant the nonsuit violates a ministerial duty and should be corrected by mandamus. *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56 (Tex. 1991).

In *Hjalmarson v. Langley*, 840 S.W.2d 153 (Tex.App. – Waco, 1992, orig. proceeding) the Waco Court of Appeals was faced with a very similar jurisdictional issue following a plaintiff's nonsuit. In that case, the plaintiff took a nonsuit on January 6, 1992. Although not necessary, the trial court signed the order of nonsuit the same day. On January 15th, the defendant filed a Motion for Sanctions under Rule 13, Texas Rules of Civil Procedure. The court's hearing on the motion for sanctions was held on January 30th and an order was entered and signed on February 17th. The Waco Court held that the plaintiff's right to a nonsuit was absolute because no claim for affirmative relief or motion for sanctions was pending at the time of the nonsuit. Any action taken after the nonsuit without reinstating the cause was erroneous and void because the cause was never reinstated and the court signed the sanction order after its plenary power to reinstate had expired.

B. The Respondent's Authority to Sanction is Dependent Upon Jurisdiction.

The Respondent may not base its decision upon, "its statutory, common law and inherent powers and jurisdiction" because it had no jurisdiction over the underlying case at the time it acted. In *Hjalmarson*, the court considered the issue of a trial court's inherent power to sanction. The court opined that a court's inherent judicial power does not confer jurisdiction where none preexists by statutory or constitutional grant. The inherent power of a court to sanction has its ancient roots in the court's jurisdiction and a court cannot lose its jurisdiction and yet retain it to act at the same time. *Id.* at 155.

Here, the trial court did not retain jurisdiction over the case. Its inherent power to sanction is reliant upon its jurisdiction over the case. When the Respondent lost jurisdiction over the case, it correspondingly lost its authority and power to sanction in that particular case under its inherent power.

Likewise, the court had no power to sanction under "statutory or common law." In *Kutch v. Del Mar College*, 831 S.W.2d 506, 509 (Tex. App. – Corpus Christi, 1992, no writ), this Court held that Texas courts have inherent power to sanction bad faith conduct during litigation. Again, this presupposes that a trial court has jurisdiction over the cause in which it is issuing the sanctions.

The *Hjalmarson* court recognized that its holding was in conflict with the San Antonio court in *Wolma v. Gonzalez*, 822 S.W.2d 302 (Tex.App. – San Antonio 1991, orig. proceeding). The Hjalmarson court stated that the Wolma decision could not be squared with established

legal principles relating to jurisdiction and rejected its reasoning. All other Courts of Appeals that have considered the issue have rejected the *Wolma* case and have adopted the reasoning in *Hjalmarson*, See e.g. *Warfield Electric v. Harry Hines Property Venture*, 871 S.W.2d 273 (Tex.App. – Eastland 1994, no writ); *Jobe v. Lapidus*, 874 S.W.2d 764 (Tex.App. – Dallas 1994, writ denied); and *Schexnider v. Scott & White Memorial Hospital*, 906 S.W.2d 659 (Tex.App. – Austin 1995, writ filed). This court has also considered the conflict between *Wolma* and *Hjalmarson*, and squarely sided with the Waco Court. *Vera v. Perez*, 884 S.W.2d 182 (Tex.App. – Corpus Christi 1994, no writ).

The trial court's *sua sponte* attempt to create jurisdiction by its attempt to abate the nonsuit on October 2, 1996 likewise fails. Blacks Law Dictionary, 4th Ed., Revised, defines abate as to "throw down, to beat down, destroy, quash, to do away with or nullify or lessen or diminish". A trial court cannot abate an action that is already dismissed. Because a plaintiff's right to take a nonsuit is absolute and the trial court's granting of the nonsuit is a ministerial act, the Respondent's attempt to abate the case is also a nullity, regardless of the nomenclature used. *Greenburg v. Brookshire*, 640 S.W.2d 870 (Tex. 1982), *Hooks v. Fourth Court of Appeals*, 808 S.W.2d at 59.

The trial court's attempt to retain jurisdiction through abatement is also a nullity because there was never an attempt to reinstate the cause pursuant to Tex. R. Civ. P. 165a. This Rule does not authorize or contemplate a reinstatement on the court's own motion. It requires a verified motion filed by one of the parties within thirty days of the dismissal or nonsuit. Neither the

plaintiffs nor any defendant moved for reinstatement. In addition, no signed order of reinstatement was entered by the court within 75 days of the nonsuit as required by Tex. R. Civ. P. 165a(3).

The bottom line is that the nonsuit was taken on September 5, 1995. The written order on sanctions was issued by the court on January 4, 1996. The action by the trial court took place in 121 days after the nonsuit. The rules of appellate procedure and civil procedure do not allow a trial court to retain jurisdiction over a cause for more than 105 days under any conceivable jurisdictional scenario. The Respondent's order in this case was simply entered too late.

In summary, the trial court could not grant sanctions under its statutory, inherent or common law power because it had no jurisdiction over the cause.

IV. SANCTIONS ARE IMPROPER BECAUSE THE RELATORS VIOLATED NO RULE OF PROCEDURE

The trial court in its order found that the Relators knowingly and intentionally violated the local rules of practice which provide for random assignment of cases. The court further found that Relators violated local rules of practice by filing notices of nonsuits which attempted to deprive the defendants of their right to present or defend all of the cases in a particular court. The court further found that the Relators violated Rule 13 by filing the underlying case in bad faith. The trial court improperly determine that the Relators violated Rule 1 in that they attempted to reserve exclusively unto themselves

the right to have their case heard in a particular court. Respondent clearly abused its discretion in granting sanctions because no rule of procedure or local rule was violated.

A. Rule 13 Sanctions

The trial court granted sanctions under Tex.R.Civ.P. 13, stating that the case was filed in bad faith. Rule 13, provides, in part:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for purposes of harassment . . .
>
> No sanctions under this rule may be imposed except for good cause, the particulars which must be stated in the sanction order. "Groundless" for purposes of this rule means that no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.

Clearly, Rule 13 allows for sanctions only if a suit is brought groundlessly **and** in bad faith. There was absolutely no evidence before the trial court to indicate that the underlying lawsuit was groundless. In fact, Relators testified that this case was brought in response to serious injuries and death of citizens of Peru which were caused by the negligence of the defendants in the underlying

case (Exhibit E at p. 24). The language of the rule indicates that in order to be sanctionable under Rule 13, the action must be groundless **and** brought in bad faith. The rule does not say that the sanctions may be imposed for an action that is groundless *or* brought in bad faith. The purpose of the rule is to check abuses in the pleading process. *Monroe v. Grider*, 884 S.W.2d 811, 817 (Tex. App. – Dallas 1994, writ denied). The language of the rule provides that no sanctions be imposed except for good cause shown and the trial court must enumerate the particulars of good cause in the sanction order. *GTE Communications Systems Corp. v. Curry*, 819 S.W.2d 652 (Tex. App. – San Antonio 1991, orig. proceeding). The trial court's order makes no finding of groundlessness. It further fails to state facts or particulars of good cause. Indeed, the evidence before the court shows that the pleadings were substantiated in fact and law and were brought in good faith. Further, the trial court's order does not show good cause as is required by the specific language of the rule. Courts presume that papers are filed in good faith. A party moving for sanctions for violation of Rule 13 has the burden of overcoming the presumption. See *GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 731 (Tex. 1993).

The Respondent clearly abused its discretion in granting sanctions under Tex.R.Civ.P. 13 because there was no evidence that the lawsuit brought was groundless and brought in bad faith and there was no finding by the trial court to that effect. Further, a trial court may not impose Rule 13 sanctions after it loses jurisdiction. *Vera v. Perez*, 884 S.W.2d at 182. In summary, the trial court's

order does not show good cause for granting sanctions under Tex.R.Civ.P. 13 because there was none.

B. Rule 1 Sanctions

The trial court was also incorrect in granting sanctions against Relators based upon Tex.R.Civ.P. 1. Rule 1 reads, in part:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.

Rule 1 has as its broad purpose a fair, just, equitable and impartial adjudication of the rights of litigants. The language of the rule does not proscribe any sanctions for the failure of a party to comply with the rule. Further, no Texas cases have interpreted the rule with respect to sanctions or the types of conduct which are violative of the rule and would warrant sanctions.

The Respondent clearly abused its discretion in granting sanctions under that rule for the reason that there was no evidence before the court that Relators violated the rule. Regardless, the rule does not proscribe any sanctions for its violation. There was nothing before the trial court to show that Relators were in any way attempting to circumvent an impartial or unfair adjudication of the rights of the litigants. Again, the court's inherent power to sanction under Rule 1, if it existed, expired when its jurisdiction over the case expired. Respondent clearly abused its discretion in granting sanctions under Rule 1.

C. VIOLATION OF LOCAL RULES OF PRACTICE

The Respondent also found that the Relators had violated local rules of practice which provide for the random assignment of cases. A review of the rules which concern the random assignment of cases clearly shows that those rules were not violated by the Relators in this case (Exhibits G and H). Unlike the county court rules, the rules of the district court, which were made with the authority of this Respondent and the other district judges, do not even proscribe sanctions for violation of the rules. Regardless, the evidence before the court did not show any violation of these rules. Again, any inherent power of the court to sanction under the rules would have necessarily expired when its jurisdiction over the case expired.

V. SANCTIONS WERE UNCONSTITUTIONALLY IMPOSED

A. Due Process of Law – Notice

The trial court's sanction order is void and constitutes an abuse of discretion for which there is no adequate remedy at law because the order imposed sanctions violative of Relators' rights of due process under the Fifth and Fourteenth Amendments of the United States Constitution and Article One, Section 19, of the Texas Constitution. A trial court must follow the due process procedures provided by law in order to sanction an attorney or hold them in contempt. *Kidd v. Lance*, 794 S.W.2d 586 (Tex.App. – Austin, 1990, orig. proceeding). Due process safeguards requiring adequate notice and hearing are the same whether the trial court is considering fining an attorney

$500.00 for contempt of court or imposing a $10,000.00 fine and calling it a sanction. *Id.* at 588.

In *Kidd*, the trial court sanctioned a defendant for purportedly violating a motion in limine. The court determined that mandamus was the only remedy available to Relator to address the sanctions issue. *Id.* at 587. The court opined that it could find no foundation whatsoever for any of the sanctions assessed against the Relator. *Id.* at 588. The real parties in interest, in *Kidd*, argued that the court's order was not imposed for contempt pursuant to Tex. Gov't. Code Ann. §21.002(d) but was a sanction under Tex. Gov't. Code Ann. §82.061 (Vernon 1988). The Court of Appeals held that Relators were entitled to the due process safeguards of §21.002, regardless.

Likewise, in this case, Respondent did not comply with the procedural requirements set forth in §21.002 of the Government Code. Relators filed written objections to the court's attempt to sanction them prior to the November 10, 1995, hearing (Exhibit F). The court's October 2, 1995 *sua sponte* order, in effect, charged Relators with a violation of Rule 3.1 and 3.13 of the Local Rules of Administration of the District Courts of Nueces County. As Relators pointed out in writing prior to the hearing, the October 2, 1995 Order was vague and ambiguous and failed to apprise Relators of the act or acts alleged to be in violation of the local rules. (Exhibit F).

The trial court's orders here are an attempt to sidestep the safeguards of due process by way of nomenclature. Courts have long held that in order for a court order to be enforceable by contempt, the order must set out in clear and unambiguous language exactly what duties or

obligations are imposed upon the alleged contemnor. *Ex parte Kraus*, 863 S.W.2d 104 (Tex. App. – Corpus Christi 1993, no writ). Contemptuous acts must be directly contrary to the expressed terms of a court order and when a court seeks to punish by fine, arrest, or imprisonment for disobedience of an order, that order must carry no uncertainty and must be not susceptible of different meanings or constructions. *Id.* at 106; *Ex parte Blasingame*, 748 S.W.2d 444 (Tex. 1988); *Ex parte Blanchard*, 736 S.W.2d 642 (Tex. 1987).

The Court's October 2, 1995, *sua sponte* order falls short of those due process safeguards by failing to set out with specificity the exact rules of court the Relators were alleged to have violated, failed to give Relators notice under what authority the court was attempting to sanction or punish them, and failed to state what the parameters of such sanctions would be. There is absolutely no justification for a distinction between sanctions and fines under the constitution.

The trial court's Order of October 2, 1995, was nebulous. It mentioned Local Rules 3.1 and 3.13 and the Standing Orders of the District Court as giving the Court authority to require Relators to show cause why they should not be sanctioned for intentionally violating the Rules of Court and Standing Orders of the Court. This was clearly insufficient under the Government Code to provide Relators' notice. Rule 3 of the Local Rules of Nueces County provides that all cases are to be filed, docketed, and assigned pursuant to Rule 10(b) of the Rules of Judicial Administration of the Supreme Court of Texas and §§74.093, 74.121, and 75.011(i) of the Texas Government Code. Rule 3.1 allows for transfer of cases

within the Courts after assignment to a particular Court. These rules do not, in any way, provide the Courts with the authority to sanction in the event that these Rules are violated. Further, the evidence before the Respondent in its hearing on November 10, 1995, do not in any way show that the Rules were violated.

For these reasons, the court should grant the Petition for Writ of Mandamus and order the trial court to vacate its order of January 4, 1996. The Respondent clearly entered an Order which is void.

B. Constitutional Violation of Separation of Powers

The trial court's order of January 4, 1996, ordering sanctions against Relators is also a clear abuse of discretion for violation of Article 2, Section 1 of the Texas Constitution, separation of powers. It is axiomatic in our system of jurisprudence and, under both the Texas and the United States Constitutions, that a court must be a neutral arbitrator of both the facts and the law. In this case, the Respondent Trial Judge was both the prosecutor and judge and as such, the Court's January 4th order is a violation of these core principles.

The record shows that no defendant in this cause was served or filed an answer prior to the plaintiff taking the nonsuit nor within the thirty days following the nonsuit in which the court retained plenary power. The "charging" instrument in this case was the court's *sua sponte* order which in itself made findings and what appear to be conclusions. (Exhibit D). At the court's hearing on

November 10, 1995, the court acted as prosecution and judge calling its own witnesses and then pronouncing judgment on its own evidence. (Exhibit E). The first time any party, other than Relators, appeared was at that hearing when Mr. Edwardo Roberto Rodriguez appeared on behalf of Southern Peru Copper Company, one of the original defendants.

Again, in *Kidd v. Lance*, the trial court sanctioned a party and its attorney for alleged violations of a motion in limine. The real parties in interest argued that the sanction was for behavior under Section 82.061 of the Texas Government Code and thus the due process safeguards of §21.002 of the Government Code were not applicable. The court rightfully rejected this argument and held that such safeguards were required. Those safeguards include the right to have another judge appointed to hear the matter. At a minimum, the trial court in this cause should have followed the procedural safeguards set out in §21.002 of the Government Code.

VI. CONCLUSION AND PRAYER FOR RELIEF

Respondent's order is both void and a clear abuse of discretion. Relators have no adequate appellate remedy for this erroneous order. Accordingly, this Court should grant Relators' Petition for Writ of Mandamus and order Respondent to vacate his Order on Sanctions of Attorneys dated January 4, 1996. Relators further pray for such

other and further relief to which they may be justly entitled.

Respectfully submitted,

Brin & Brin, P.C.
1202 Third Street
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(512) 881-9643
(512) 883-0506 fax

By /s/ Eric G. Brown
Eric G. Brown
State Bar No. 03120500
Linda C. Breck
State Bar No. 02938600
ATTORNEY FOR RELATORS

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 1996, a true and correct copy of the foregoing Petition for Writ of Mandamus, Brief, and Record in Support of the Petition was forwarded to the Respondent by Hand Delivery at the following address:

Honorable Max Bennett
319th District Court of Texas
Nueces County Courthouse
901 Leopard St.
Corpus Christi, Texas 78401

/s/ Eric G. Brown
ERIC G. BROWN

APPENDIX J

Robert C. HILLIARD and Andrew C. Schirrmeister, III, Relators,

v.

The Honorable Max BENNETT, Judge of the 319th District Court of Nueces County, Texas, Respondent.

No. 13-96-042-CV.

Court of Appeals of Texas, Corpus Christi.

June 13, 1996.

Eric Brown, Linda C. Breck, Corpus Christi, for appellant.

Before DORSEY, FEDERICO G. HINOJOSA, Jr., and RODRIGUEZ, JJ.

OPINION

DORSEY, Justice.

This mandamus proceeding challenges the authority of a trial court *sua sponte* to sanction an attorney who has filed and then nonsuited an action that was assigned to the respondent's court. We hold the respondent lost jurisdiction over the cause before the motion for sanctions was filed, and thus the order sanctioning relators is void. We conditionally grant a writ of mandamus.

The respondent is Max Bennett, Judge of the 319th District Court of Nueces County. Relators, Robert C. Hilliard and Andrew Schirrmeister, III, are Texas attorneys representing multiple plaintiffs who claim to have been

injured by toxic gases and chemicals released by the Southern Peru Copper Corporation. On August 30, 1995, and August 31, 1995, relators filed some sixteen separate lawsuits with the Nueces County District Clerk, each on behalf of separate plaintiffs but arising out of the same occurrence, alleging the same causes of action, and against the same defendants. The lawsuits were, in accordance with local rules of Nueces County, each randomly assigned to one of the eight district courts of the county. The first lawsuit filed by relators was assigned to the respondent's 319th District Court. The other actions were assigned when filed to other district courts, until one was assigned to the 105th District Court. On September 5, 1995, the relators filed notices of nonsuit in all the lawsuits except the one in the 105th.

Although the defendants had neither been served nor had answered in any of the nonsuited actions, including the one in the 319th District Court, Judge Bennett refused to dismiss it and on October 2, 1995, signed a Sua Sponte Order Abating Dismissal and Setting Hearing on Transfer, Consolidation and Sanctions. By that order, the respondent required the relators to appear before him on November 10, 1995, and show cause, among other things, why they should not be sanctioned for violating the rules concerning random assignment of cases in Nueces County.

The sanctions hearing was held as scheduled in the 319th District Court, with Judge Max Bennett presiding. At that hearing, the judge called and questioned witnesses, overruled pleas to his jurisdiction, and overruled assertions of Fifth Amendment rights by the respondents when the judge called them to testify. The judge called as

a witness a representative from the Nueces County District Clerk's Office and the relators themselves, concerning the relators' conduct in filing multiple lawsuits with the district clerk. Relators admitted to the multiple filings, but denied any intent to violate any of the rules of court and stated that they acted in good faith and intended to diligently prosecute the case remaining in the 105th District Court. The relators did not present any evidence but argued against the respondent's jurisdiction to sanction them, as well as fundamental due process concerns.

The respondent then announced his determination that relators be sanctioned for their conduct.

On January 4, 1996, Judge Bennett signed an "Order on Sanction of Attorneys," finding that the relators knowingly and intentionally violated the local rules that provide for the random assignment of cases, violated Rule 13, by filing the lawsuit in bad faith, and violated Rule 1's requirements of a just, fair, equitable and impartial adjudication of the rights of litigants. The respondent then ordered relators "as a sanction, each to pay unto the clerk of the court the sum of $10,000 on or before February 5, 1996." This court has stayed the sanctions order pending our determination of this mandamus proceeding.

The attorneys, Hilliard and Schirrmeister, sought leave to file a petition for writ of mandamus in this court, along with accompanying briefs and exhibits. Leave to file was granted, and the matter was set for argument. Respondent, the Honorable Max Bennett, Judge of the 319th District court, did not file any response or brief,

although invited to do so.[1] We are called on to decide this matter without the benefits conferred by the adversary system, where each side vigorously explores the law to aid the court in its analysis and decision.

I. JURISDICTION

Relators first argue that the trial court had no jurisdiction to continue the lawsuit and impose sanctions after they filed notice of nonsuit disposing of all claims. We agree.

Plaintiff's right to nonsuit is absolute absent a pending claim for affirmative relief or motion for sanctions. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840 (Tex. 1990); *Hjalmarson v. Langley*, 840 S.W.2d 153, 154 (Tex. App. – Waco 1992, orig. proceeding). The granting of a nonsuit is merely a ministerial act which the trial court has no discretion to deny, unless the defendant has, prior to that time, filed pleadings seeking some form of affirmative relief. *Greenberg v. Brookshire*, 640 S.W.2d 870, 872 (Tex. 1982); *Strawder v. Thomas*, 846 S.W.2d 51, 59 (Tex. App. – Corpus Christi 1992, no writ). Accordingly, the trial court has no discretion to refuse to dismiss, or to reinstate, a case to consider a claim for affirmative relief that is filed subsequent to the plaintiff's notice of nonsuit. *Id.* at 59; *see also Quanto Intern. Co. v. Lloyd*, 897 S.W.2d

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[1] Judge Bennett filed, prior to argument, an order signed by the district judges of Nueces County directing the district clerk to assign cases, both civil and criminal, randomly among the courts. Judge Bennett approved the order after leave to file had been granted but before argument in this court.

482, 486 (Tex. App. – Houston [1st Dist.] 1995, orig. proceeding).

A court has no more power to act in sanction matters without jurisdiction than it does elsewhere. *Hjalmarson*, 840 S.W.2d at 155. Accordingly, the trial court's jurisdiction and discretion to impose sanctions after the filing of a nonsuit are generally measured in the same manner as its authority to grant other types of affirmative relief which had not been requested before the nonsuit. *See Schexnider v. Scott & White Memorial Hosp.*, 906 S.W.2d 659, 663 (Tex. App. – Austin 1995, no writ); *Vera v. Perez*, 884 S.W.2d 182, 184 (Tex. App. – Corpus Christi 1994, no writ); *Jobe v. Lapidus*, 874 S.W.2d 764, 766 (Tex. App. – Dallas 1994, writ requested); *Warfield Electric of Texas, Inc. v. Harry Hines Property Venture*, 871 S.W.2d 273, 275 (Tex. App. – Eastland 1994, no writ); *Hjalmarson*, 840 S.W.2d at 154-56; *but see Wolma v. Gonzalez*, 822 S.W.2d 302 (Tex. App. – San Antonio 1991, orig. proceeding) (holding that jurisdiction to grant Rule 13 sanctions remained after trial court's plenary power expired).

In the present case, no claim for affirmative relief or for sanctions had been filed at the time relators filed their notice of nonsuit. Nor had the trial court before that time announced its intentions *sua sponte* to consider or impose sanctions. Accordingly, the trial court had no discretion after the nonsuit to inject an affirmative claim for sanctions into the lawsuit, over which it maintained jurisdiction and discretion to perform merely the ministerial act of ordering dismissal. We hold the trial court lacked jurisdiction to impose sanctions and its order is void.

II. DUE PROCESS

If the jurisdictional shortcomings are overlooked, serious due process concerns are implicated. Even if the relators had not nonsuited the underlying lawsuit and the respondent could demonstrate that he was acting within his inherent power to sanction,[2] he did not have the authority to be both accuser and adversary to the relators on the one hand, while remaining the ultimate judge of their conduct on the other.

A trial court generally has no authority to impose sanctions *sua sponte*, in as much as it deprives the party against whom sanctions are to be imposed of notice and an opportunity to be heard. *See Shockey v. A.F.P., Inc.*, 905 S.W.2d 629, 630 (Tex.App. – Houston [14th Dist.] 1995, no writ); *Zep Mfg. Co. v. Anthony*, 752 S.W.2d 687, 689 (Tex. App. – Houston [1st Dist.] 1988, orig. proceeding). In the

---

[2] We need not determine whether under certain circumstances the trial court might have the inherent power to sanction conduct of the nature engaged in by the relators. It is clear that the present sanctions may not be based on a violation of Texas Rule of Civil Procedure 13, regarding groundless pleadings. There is no indication in the record or finding by the trial court that the claims made by relators in the underlying lawsuit are groundless. *See Johnson v. Smith*, 857 S.W.2d 612, 617 (Tex.App. – Houston [1st Dist.] 1993, orig. proceeding). Nor do Texas Rule of Civil Procedure 1 or the Neuces County Local Rules concerning ramdom assignment of cases provide an independent basis for the trial court to impose sanctions against the relators. Accordingly, the sanctions imposed in the present case could only have been authorized, if at all, under the inherent power of the trial court to sanction for abuses of the judicial process that may not be covered by rule or statute. *See Kutch v. Del Mar College*, 831 S.W.2d 506, 509-10 (Tex. App. – Corpus Christi 1992, no writ).

present case, the trial court attempted to give notice and an opportunity for relators to be heard before imposing sanctions. However, the problems involved with the trial court *sua sponte* imposing sanctions against an attorney go beyond those involving notice and an opportunity to be heard.

One of the most fundamental components of a fair trial is "a neutral and detached judge." *Metzger v. Sebek*, 892 S.W.2d 20, 38 (Tex.App. – Houston [1st Dist.] 1994, writ denied) (quoting *Ward v. Village of Monroeville*, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972). A judge should be fair and impartial and should act neither as an advocate for any party nor as an adversary to any party. *Metzger*, 892 S.W.2d at 38; *Ex parte Finn*, 615 S.W.2d 293, 296 (Tex.Civ.App. – Dallas 1981, no writ). Accordingly, it is generally improper for the trial judge on his own initiative to bring proceedings against a party in his court. *See Finn*, 615 S.W.2d at 296.

In the present case, the relators' multiple-filings scheme somehow came to the attention of the respondent, who then took it upon himself to punish relators for their conduct by means of a sanction loosely connected to the one case that had been filed in his court. However, absent a defendant to complain of the relators' conduct, the trial judge himself had to become the prosecutor – to file a complaint, gather information, and examine witnesses – while retaining the power to determine guilt and to rule on objections. This is fundamentally inimical to our system of justice.

Because the respondent in the present case has imposed sanctions in a lawsuit that has already been

nonsuited and in a manner inconsistent with his role as a judge, we cannot uphold the present sanctions order.

We conditionally grant a writ of mandamus ordering the trial court to vacate his sanctions order against the relators, and we trust that he will perform his ministerial duty of dismissing the underlying lawsuit. The writ will not issue unless the trial court fails to comply with the opinion of this court.

APPENDIX K

Cause No. 95-4900-G

TIMOTEO AGUILAR	)(	
COAGUILA AND MARIA	)(	IN THE DISTRICT
MAGDALENA LLANOS	)(	COURT
INDIVIDUALLY AND AS	)(	
NEXT FRIEND FOR	)(	
REGMAN AGUILAR	)(	
LLANOS, A MINOR;	)(	
VS.	)(	319th JUDICIAL
	)(	DISTRICT
SOUTHERN PERU COPPER	)(	
CORPORATION, ASARCO,	)(	
INC., CERRO TRADING CO.,	)(	
INC., CERRO SALES	)(	
CORPORATION, THE	)(	
MARMON CORPORATION,	)(	
THE MARMON GROUP,	)(	NUECES COUNTY,
INC., MARMON HOLDINGS,	)(	TEXAS
INC., GL CORPORATION,	)(	
PHELPS DODGE OVERSEAS	)(	
CAPITAL CORPORATION,	)(	
PHELPS DODGE	)(	
CORPORATION, PHELPS	)(	
DODGE REFINING	)(	
CORPORATION, PHELPS	)(	
DODGE INDUSTRIES, INC.,	)(	
NEWMONT GOLD	)(	
CORPORATION, NEWMONT	)(	
MINING CORPORATION,	)(	
INC., BILLITON B.V., AND	)(	
MITSUI & CO., LTD.	)(	

ADDITIONAL FINDINGS OF FACT

(Filed Feb. 9, 1996)

It appearing to the court that the findings of fact set out in its "Order on Sanctions of Attorneys" signed and entered herein on January 4, 1996, as well as the Exhibits filed by Petitioner in Case No. 96-00042-CV in the Court of Appeals for the 13th Judicial District of Texas, failed to refer to the standing order also concerning the requirement for random assignment of cases in the District Courts of Neuces County;

It is therefore Ordered that the prior findings of fact are supplemented, amended, and enlarged so as to be complete, to include the following:

Additional Findings

By Order dated 19 November 1992, the District Judges of Nueces County, Texas, ordered the random assignment by the District Clerk of Nueces County of all of the criminal and civil cases filed in the various district courts in the manner set out in the Order, a copy of which is attached hereto, and incorporated herein, as Exhibit "A."

Signed and Ordered this 9th Day of February, 1996.

/s/ Max Bennett
Max Bennett
Judge

SUBSTITUTE ORDER ON ASSIGNING CRIMINAL AND CIVIL CASES IN THE DISTRICT COURTS OF NUECES COUNTY

****

TO: THE DISTRICT CLERK OF NUECES COUNTY, GREETINGS:

On September 9, October 9, and November 19, 1992, the District Judges of Nueces County, sitting as the Nueces County Judges Conference, and formerly known as the Board of Judges, by majority vote, determined that as of January 1, 1993, all District Courts of the County would receive an equal share of civil and criminal cases filed with the District Clerk of Nueces County.

Further, by majority vote, it was determined that each District Court would retain cases, civil and/or criminal, then pending in the particular court.

Further, it was determined that the 105th Judicial District Court of Nueces, Kleberg and Kennedy Counties, would receive one half (1/2) the share of civil case assignments received by any other District Court of Nueces County; but a full share of criminal case assignments.

THEREFORE, IT IS ORDERED THAT ON AND AFTER JANUARY 1, 1993, the District Clerk of Nueces County shall assign to the District Courts of the County, at random, an equal number of such civil and criminal cases as shall be filed with the Clerk, except for the 105th Judicial District Court, which shall receive one half (1/2) the share of civil cases assigned to any other District Court of Nueces County.

The District Clerk may use a formula with 15 as its common denominator in civil cases, with 1/15th of all

civil cases filed with the Clerk being assigned to the 105th Judicial District Court, and 2/15ths of all civil cases filed with the Clerk being assigned to each of the other seven District Courts of the County; and a formula with 8 as its common denominator in criminal cases with 1/8th of all criminal cases filed with the Clerk being assigned to each of the eight District Courts of the County.

Attached as Exhibit 1 is the Order of the Judges initially formalizing the assignment of cases beginning 1 January 1993.

SIGNED THIS DAY: 19 November 1992

/s/ Robert M. Blackmon
ROBERT M. BLACKMON
Presiding Judge, Nueces County
Courts and for the Nueces
County Judges Conference

BEST AVAILABLE COPY

ORDER ON ASSIGNING CRIMINAL AND CIVIL CASES IN THE DISTRICT COURTS

OF NUECES COUNTY

* * * * * * * * * * * * * * * * * * * *

TO: THE DISTRICT CLERK OF NUECES COUNTY, GREETINGS:

On September 9 and October 9, 1992, the District Judges of Nueces County, sitting as the Nueces County Judges Conference, and formerly known as the Board of Judges, by majority vote, determined that as of January 1, 1993, all District Courts of the County would receive an equal share of civil and criminal cases filed with the District Clerk of Nueces County.

Further, by majority vote, it was determined that each District Court would retain cases, civil and/or criminal, then pending in the particular court.

Further, it was determined that the 105th Judicial District Court of Nueces, Kleberg and Kennedy Counties, would receive one half (½) the share of civil case assignments received by any other District Court of Nueces County; but a full share of criminal case assignments.

THEREFORE, IT IS ORDERED THAT ON AND AFTER JANUARY 1, 1993, the District Clerk of Nueces County shall assign at random an equal number of such civil and criminal cases as shall be filed with the Clerk, except for the 105th Judicial District Court, which shall receive one half (½) the civil cases assigned to any other District Court of Nueces County.

The District Clerk may use a formula with 15 as its common denominater, in civil cases with 1/15th of all ~~criminal cases and 1/15th of all~~ civil cases filed with the Clerk being assigned to the 105th Judicial District Court and 2/15ths of all ~~criminal cases and 2/15ths of~~ all civil cases filed with the Clerk being assigned to each of the other seven District Courts of the County: And a formula with 8 as its common denominator in criminal cases with 1/8th of all criminal cases filed with the Clerk being assigned to each of the Eight District Courts of the County.

730377 (38th 2/9/96)

SIGNED THIS DAY: 19 November 1992.

Presiding Judge, Nueces County COurts and for the Nueces County Judges Conference

As to form, approved:

102/132 (105)

1179[illegible]

Ex 1

1230210

1290705 (51st)

App. 145

APPENDIX L

(SEAL) OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS

RE: Case No. 96-0598 June 28, 1996

Style: MAX BENNETT, JUDGE OF THE 319th JUDICIAL DISTRICT COURT, NUECES v. THE THIRTEENTH COURT OF APPEALS

Relator's motion for leave to file petition for writ of mandamus in the above styled case was this day filed with the Supreme Court of Texas.

John T. Adams, Clerk

APPENDIX M

(SEAL) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

December 4, 1997

Mr. Joseph A. Rodriguez
Rodriguez Colvin & Chaney
P.O. Box 2155
Brownsville, TX 78522

Mr. Carlos Villarreal
Hunt Hermansen McKibben & English
555 North Carancahua, Suite 1100
Corpus Christi, TX 78478

Ms. Linda C. Breck
Brin & Brin
1202 Third Street
Corpus Christi, TX 78404

Mr. Doug Lackey
Brown McCarroll & Oaks Hartline
111 Congress Avenue
1400 Franklin Plaza
Austin, TX 78701

Mr. Eric Brown
Brown & Grimes
3000 South IH-35, Suite 205
Austin, Tx 78704

RE: Case Number 96-0598

Style: IN RE MAX BENNETT, JUDGE OF THE 319th JUDICIAL DISTRICT COURT, NUECES COUNTY, TEXAS
Original mandamus proceeding

Dear Counsel:

Today, the Supreme Court of Texas delivered the enclosed opinion in the above-referenced cause. Enclosed also is the judgment of the Supreme Court of Texas as said judgment appears in the Minutes of this Court. This is the judgment that will issue in mandate form to the

lower court if no motion for rehearing is filed or if a filed motion for rehearing is overruled.

The relator is assessed an additional filing fee in the amount of $75.00 for the granting of the petition for writ of mandamus. Please note that this additional filing fee is due and payable immediately; please make your check payable to Clerk, Supreme Court of Texas.

Sincerely,

John T. Adams, Clerk

by /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

Enclosure

cc: The Hon. Darrell B. Hester
Ms. Cathy Wilborn, Clerk
Mr. John Ward
Mr. R. Kinnon Goleman
Ms. Joanne B. Grossman
Mr. Peter J. Nickles

APPENDIX N

No. 96-0598

IN THE SUPREME COURT OF TEXAS

IN RE MAX BENNETT, JUDGE OF THE
319TH JUDICIAL DISTRICT COURT,
NUECES COUNTY, TEXAS, RELATOR

****

ON PETITION FOR WRIT OF MANDAMUS

****

MOTION FOR REHEARING ON BEHALF OF
ROBERT C. HILLIARD AND
ANDREW SCHIRRMEISTER, III

****

(Filed Dec. 19, 1997)

ERIC G. BROWN
State Bar. No. 03120500
LAW OFFICE OF ERIC G. BROWN
3000 South IH-35, Suite 205
Austin, Texas 78704
512-441-5881
512-441-5859 Fax

ATTORNEY FOR RESPONDENTS
ROBERT C. HILLIARD and
ANDREW SCHIRRMEISTER, III

NO. 96-0598

IN THE SUPREME COURT OF TEXAS

IN RE MAX BENNETT, JUDGE OF THE 319TH
JUDICIAL DISTRICT COURT, NUECES COUNTY,
TEXAS, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

FROM THE DISTRICT COURT OF NUECES COUNTY,
TEXAS 319TH JUDICIAL DISTRICT

MOTION FOR REHEARING OF RESPONDENTS ROBERT C. HILLIARD and ANDREW SCHIRRMEISTER, III

TO THE HONORABLE MEMBERS OF THE SUPREME COURT OF TEXAS:

COMES [sic] NOW, Robert C. Hilliard and Andrew Schirrmeister, III, Respondents' ~~Attorneys~~ in the above styled and numbered matter, and pursuant to Rule 190(b), of the Texas Rules of Appellate Procedure, serve and file this Motion for Rehearing, in which rehearing Respondents' Counsel seek to correct certain errors and omissions in the original decision by this Court, issued December 4, 1997.

I.

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II.

TABLE OF AUTHORITIES

CASES

Ex Parte Finn, 615 S. W. 2d 293, 296 (Tex. Civ. App.-Dallas 1981 no writ) 3

Ford Motor Co. v. Tyson, 943 S. W. 2d 527 (Tex. App.-Dallas 1997) 7

Hilliard v. Bennett, 925 S. W. 2d 338, 341 (Tex. App.-Corpus Christi 1996) 3

Kidd v. Lance, 794 S. W. 2d 586 (Tex. App.-Austin 1990) 8

Lawrence v. Kohl, 853 S. W. 2d 697 (Tex. App.-Houston [1st Dist] 1993) 7

Metzger v. Sebek, 892 S. W. 2d 20, 38 (Tex. App.-Houston [1st Dist] 1994 writ denied) 3

Offutt v. United States, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954) 4

Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2697, 41 L.Ed.2d 897 (1974) 3

Ward v. Village of Monroeville, 93 S. Ct. 80, 84 (1972) 3

III.

STATEMENT OF THE CASE FOR REHEARING

In this Motion for Rehearing[1] Respondents (also referred to as Plaintiffs' Counsel)[2] Plaintiffs' Counsel seek to submit to this Court errors and omissions raised in

---

[1] This Court in its opinion referred to Respondents' as "Plaintiffs' Counsel", therefore, I will do likewise.

[2] [No footnote in copy.]

their response to the Petition for Writ of Mandamus that either were not fully addressed by this Court or omitted entirely in this Courts opinion. Although Plaintiffs' Counsel disagree with the Courts opinion on the issue of jurisdiction as contrary to established rules of law and due process, this Motion for Rehearing will address other issues. This includes the arguments that the removal of the underlying action to Federal District Court also deprived the Court of jurisdiction. Plaintiffs' Counsel in no way waives or abandons its jurisdictional arguments previously make in this case.

IV.

POINT OF ERROR FOR REHEARING

REHEARING POINT OF ERROR NO. 1:

The Court erred in ordering the court of appeals to vacate its writ of mandamus in this case because Judge Bennett violated the Separation of Powers doctrine and Due Process rights of Plaintiffs' counsel guaranteed by the United States Constitution and the Constitution of the State of Texas. The Court should have denied relief based on the court of appeals ruling on due process or at the minimum remanded to the court of appeals for full consideration of all the issues raised in addition to the jurisdictional issues.

V.

BRIEF OF THE ARGUMENTS

Since this Court has ruled that the trial court had jurisdiction to impose sanctions on attorneys for pre-

removal conduct, the Court must remand this case back to the court of appeals for consideration of what the court of appeals called "serious due process concerns". Even if the court of appeals opinion concerning due process is "dicta" the court of appeals found serious violations of due process of law. In its opinion the Thirteenth Court of Appeals wrote:

> "In the present case, the trial court attempted to give notice and an opportunity for relators to be heard before imposing sanction. However, the problems involved with the trial court sua sponte imposing sanctions against an attorney go beyond those involving notice and an opportunity to be heard.
>
> One of the most fundamental components of a fair trial is 'a neutral and detached judge.' *Metzger v. Sebek*, 892 S.W.2d 20, 38 (Tex. App.–Houston [1st Dist] 1994, writ denied) (quoting *Ward v. Village of Monroeville*, 93 S.Ct. 80, 84 (1972). A judge should be fair and impartial and should act neither as an advocate for any party nor as an adversary to any party. *Metzger*, 892 S.W.2d at 38; *Ex parte Finn*, 615 S.W.2d 293, 296 (Tex. Civ. App.–Dallas 1981, no writ). Accordingly, it is generally improper for the trial judge on his own initiative to bring proceedings against a party in his court. See *Finn*, 615 S.W.2d at 296.
>
> In the present case, the relators' multiple-filings scheme somehow came to the attention of the respondent, who then took it upon himself to punish relators for their conduct by means of a sanction loosely connected to the one case that had been filed in his court. However, absent a defendant to complain of the relators' conduct,

> the trial judge himself had to become the prosecutor – to file a complaint, gather information, and examine witnesses – while retaining the power to determine guilt and to rule on objections. This is fundamentally inimical to our system of justice." *Hilliard v. Bennett*, 925 S.W.2d 338, 341 (Tex. App.–Corpus Christi 1996).

The Supreme Court of the United States held in *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974), that the Fourteenth Amendment to the United States Constitution requires a state to afford due process of law to an attorney accused of contempt during trial. In addition to the right to notice and hearing, which this court has recognized, due process requires that another judge should have heard the proceeding for contempt of the attorney. The Court stated that whether there was actual bias or the appearance of bias, the trial judge was unable to hold the balance between vindicating the interest of the court and the interest of the accused. Due process requires no less. *Taylor v. Hayes*, at 501, 94 S.Ct. 2704-2705. This rule also applies to the United States courts. *Offutt v. United States*, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954)

One of the most fundamental components of a fair trial is a "neutral and detached judge." *Ward v. Village of Monroeville*, supra. A judge should not act as an advocate for any party, nor should a judge act as an adversary *to* any party. *Ex parte Finn*, supra at 296. In this case Judge Bennett took it upon himself to file the complaint, gather information, call witnesses to support his charges, cross-examine plaintiffs' counsel, rule on objections – particularly to his own examination, and then to determine

guilt and assess punishment under unspecified statutes and rules. Relator argues in his Petition that a trial judge is not relegated to sit idly by as officers of the Court abuse the system. Even if that is true, due process and separation of powers doctrines require that the court follow our Constitutions. First, the Trial Court could have requested that the Regional Presiding Judge assign a judge to hear the case that was unconnected to the controversy. Second, the court could have called upon an attorney, such as he did for this Petition, to prosecute his charges.

Obviously this Court agreed with Judge Bennett by stating that plaintiffs' counsels conduct "breeds disrespect for and threatens that integrity of our judicial system". While that issue was certainly part of Relator's Petition in this case, the greater issues were the authority, jurisdiction, and procedures involved and whether due process was afforded to the citizens of this state, *in all respects.*

Since this Court has held that the trial court had jurisdiction to hold the sanction hearing, and the court has stated that the court of appeals was writing in dicta concerning the due process issues, this Court should remand this petition for writ of mandamus to the Thirteenth Court of Appeals for a full consideration of all the issues raised in plaintiffs' attorney petition for writ of mandamus to the court of appeals. These unanswered or unresolved issues include numerous due process issues such as: (1) adequate notice of the conduct charged; (2) adequate notice of the Rules or statutes violated; (3) adequate notice of the penalties contemplated by the trial court; (4) failure to follow the rules of procedure or

sanctions set out in the rules upon which the trial court did rely; (5) unauthorized punishment under these rules; and (6) violation of the separation of powers doctrines of the United States and Texas Constitutions.

VI.

POINT OF ERROR FOR REHEARING

REHEARING POINT OF ERROR NO. 2:

The Court erred in failing to remand this petition for writ of mandamus to the court of appeals for consideration of the due process issues of whether the trial court followed the correct procedures set out in the Rules and statutes concerning sanctions and contempt.

VII.

BRIEF OF THE ARGUMENTS

The order of the trial court in issue found that plaintiffs' attorneys violated the Local Rules of Practice, and Texas Rules of Civil Procedure, Rules 13 and 1. It has been stated that Rule 13 does allow for the imposition of the sanctions appropriate under Rule 215 (2)(b). *Lawrence v. Kohl,* 853 S.W.2d 697 (Tex. App.–Houston[1st] Dist. 1993). Since there were no real parties in interest as no defendant in the original suit was served or subjected itself to the jurisdiction of the court, there were no reasonable expenses or attorneys fees to order as sanctions.

The sanction is [sic] this case was nothing more than a fine payable to the court. Of course a person may not be deprived of life, liberty, or property without due process of law. Amendment 14, United States Constitution and

Article I, § 19 of the Texas Constitution. A trial court does not have the authority to impose a fine under Rule 215 (3), Texas Rules of Civil Procedure. *Lawrence v. Kohl,* supra at 701. The $10,000.00 Sanction in this case was an arbitrary fine not authorized by rule 215(3) of the Texas Rules of Civil Procedure. *Ford Motor Co. v. Tyson,* 943 S.W.2d 527 (Tex. App.–Dallas 1997). In the *Fort Motor Co.* case the court held that the sanctions authorized under rule 215 are designed to remedy the abuse by compensating the aggrieved party for expenses incurred in the litigation. The court found that the amount was not determined by anything in the evidence, but only by the trial judge's predilection to punish the offending party and deter others in the future. The Dallas Court of Appeals concluded that a monetary fine is impermissible as a sanction for discovery abuse because, by its very nature, it is arbitrary. A fine is arbitrary because it is unrestrained by law or statute and unrelated to any damage or expenses incurred by the injured party. *Arbitrariness is a signal characteristic of a violation of substantive due process. Ford Motor Co. v. Tyson,* supra at 534.

Tex Rule of Civ. Pro. 13 provides that an attorney or party may be held in contempt of court for violation of that rule. However § 21.002 of the Texas Government Code provide due process protections not afforded to plaintiffs' attorneys in this case. That section provides that an officer of the court has the right to require that a neutral judge be assigned to hear the issue. It also provides for and gives notice to the accused of the possible penalties the contemptor is facing.

In *Kidd v. Lance,* 794 S.W.2d 586 (Tex. App.–Austin 1990), the court held that a trial court could not order a

party and its attorney to pay $53,000.00 in attorneys fees under either § 21.002 of the Government Code or under § 82.061. A trial court must comply with § 21.002 before it can fine an attorney $500.00.

In this case the only "punishment" available to the court was contempt of court under Rule 13, and that statute requires that the court comply with § 21.002 of the Government Code. In that section the offending attorney is entitled to a hearing before another judge not related to the alleged conduct. In addition, the maximum fine allowed is $500.00. Judge Bennett in this case was $9,500.00 over his maximum allowable fine.

This Court erred in failing to address, or remand to the court of appeals for that court to address the serious constitutional issues presented by the trial court's order. All of these issues were raised in the trial court and on petition for writ of mandamus to the court of appeals. Jurisdiction was not the only issue presented to this Court. If the Court believes that jurisdiction is the threshold issue, which it is, then this court has the duty to address all of the issues or to remand to the court of appeals for their consideration. To merely order the court of appeals to vacate its order is error.

PRAYER FOR RELIEF

Respondents, Robert C. Hilliard and Andrew C. Schirrmeister, III, pray that the Court grant their Motion for Rehearing and remand the proceeding to the Thirteenth Court of Appeals for full consideration of the due process and other Constitutional violations raised in that court. In the alternative, Respondents would request this

court to fully consider all issues and questions of law raised by respondents and find that the trial court abused its discretion and vacate the order sanctioning counsel in this case. Respondents would also request that since this Court granted Relator's motion for leave to file and issued its opinion without benefit of oral argument, oral argument should be had on this Motion for Rehearing.

Respectfully submitted,

/s/ Eric G. Brown
Eric G. Brown
State Bar. No. 03120500
LAW OFFICE OF
ERIC G. BROWN, P.C.
3000 South IH-35,
Suite 205
Austin, Texas 78704
512-441-5881
512-441-5859 Fax

**ATTORNEY FOR RESPONDENTS
ROBERT C. HILLIARD and
ANDREW SCHIRRMEISTER, III**

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December 1997, a true and correct copy of the foregoing document has been sent to all parties to this proceeding:

Honorable Max Bennett
319th District Court of Texas
Nueces County Courthouse
901 Leopard Street
Corpus Christi, Texas 78401

13th Court of Appeals
10th Floor
Nueces County Courthouse
901 Leopard Street
Corpus Christi, Texas 78401

Carlos Villarreal
HUNT, HERMANSEN, McKIBBEN
& ENGLISH, L.L.P.
1100 First City Tower II
Corpus Christi, Texas 78478

Robert C. Hilliard
HILLIARD & MUNOZ
719 S. Shoreline, Suite 600
Corpus Christi, Texas 78401

Andrew C. Schirmeister, III
ZUMMO & SCHIRRMEISTER, L.L.P.
2603 Augustus, Suite 1200
Houston, Texas 77057

/s/ Eric G. Brown
Eric G. Brown

APPENDIX O

(SEAL) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

March 13, 1998

Mr. Joseph A. Rodriguez
Rodriguez Colvin & Chaney
P.O. Box 2155
Brownsville, TX 78522

Mr. Carlos Villarreal
Hunt Hermansen McKibben & Villarreal
555 North Carancahua, Suite 1100
Corpus Christi, TX 78478

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1202 Third Street
Corpus Christi, TX 78404

Mr. Doug Lackey
Brown McCarroll & Oaks Hartline
111 Congress Avenue
1400 Franklin Plaza
Austin, TX 78701

Mr. Eric Brown
Law Offices of Eric G. Brown
3000 South IH-35, Suite 205
Austin, Tx 78704

RE: Case Number 96-0598
Trial Court Number: 95-4900-G

Style: IN RE MAX BENNETT, JUDGE OF THE 319th JUDICIAL DISTRICT COURT, NUECES COUNTY, TEXAS

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Sincerely,

John T. Adams, Clerk

by /s/ Michael C. Murphy
Michael C. Murphy,
Deputy

cc: Ms. Cathy Wilborn, Clerk
Mr. John Ward
Mr. R. Kinnon Goleman
Ms. Joanne B. Grossman
Mr. Peter J. Nickles

No. 97-2011

In The

Supreme Court of the United States

October Term, 1997

IN RE ROBERT C. HILLIARD,

Petitioner.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

CARLOS VILLARREAL*
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STATEMENT OF THE CASE

Petitioner's Statement of the Case mischaracterizes the factual background in this case, and Respondent respectfully offers this summary of the proceedings below.

A. Proceedings in the Trial Court.

Petitioner filed seventeen lawsuits in order to have his overseas mass toxic tort case heard by a particular judge in violation of a local rule requiring the random assignment of cases and a state rule prohibiting the filing of groundless suits in bad faith. (App. 19-20; 38-42; 48-49; 72-73; 100-104; BIO.App. 1), Respondent, Judge of the 319th District Court of Nueces County, issued a "show cause" order that gave Petitioner more than a month's notice of a hearing to consider sanctions. (App. 80-83). After mandamus efforts failed, Petitioner appeared at the hearing without objecting to the judge hearing the sanctions matter and without complaining that the standards for criminal contempt were not being satisfied. (App. 36-37). Evidence was presented and arguments were made without any personal attacks. (App. 36, *et seq.*). Approximately two months later, Respondent issued his order making findings of fact and concluding that the Texas Rules had been violated and issuing sanctions. (App. 99-106).

1. Petitioner Filed 17 Substantially Identical Suits Seeking a Particular Judge.

On August 30 and 31, 1995, Petitioner filed 17 substantially identical suits. (App. 38-42; 48-49; 100-104). The defendants were the same in each suit. The allegations were the same in each suit. The only difference between the suits were the named plaintiffs. The first suit was filed in the 319th District Court. Within 33 minutes of filing the original lawsuit, another seven cases were filed. (App. 100-101). Apparently dissatisfied with the assignment of the cases, Petitioner returned the next day to file nine cases within the span of one hour and twenty-three minutes. (App. 102-103). The last suit was filed in the court in which the Petitioner desired to have the case heard – the 105th District Court. (App. 72-73; 103; 105). Petitioner had requested that no service of citation proceed in any of the suits. (App. 46; 100.). Thus, the defendants were not even made aware of the plaintiff's multiple filings. Then Petitioner filed "notices of nonsuits" in each of the "undesirable" 16 cases, without even notifying the defendants that those lawsuits had been filed. (App. 39-41; 103). Petitioner amended his petition in the 105th District Court to add several hundred additional plaintiffs and then requested service of citation on the defendants. (App. 41-42; 103).

2. Violated Rules.

Local Rule 3 provides for the random assignment of cases among the eight district courts in Nueces County, Texas. (App. 19-20). Despite Petitioner's repeated insistence on his innocence, he admitted that he made public

statements and reported in the news media that the above described "multiple-filings-followed-by-nonsuits" scheme was designed and utilized to get this overseas mass toxic tort case before a particular district judge. (App. 72-73). Thus, it is clear that Petitioner was consciously seeking to violate Local Rule 3 insofar as it requires random assignment of cases. (App. 12-13).

Furthermore, Texas Rule of Civil Procedure 13 requires that attorneys signing pleadings certify that the pleadings they are filing are not groundless or brought in bad faith or brought for the purpose of harassment. (BIO.App. 1). The Petitioner's filing of 16 lawsuits which were immediately nonsuited by Petitioner raises a reasonable inference that these suits were groundless or brought in bad faith and therefore filed in violation of Rule 13. That rule further provides that, "If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion *or upon its own initiative*, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both." (BIO.App. 1).

The sanctions order found that Petitioner, by his above described actions, knowingly violated these rules. (App. 104-05). That order also noted the deprivation to the defendants of their rights by virtue of Petitioner's specific failure to obtain service upon defendants, coupled with the immediate nonsuit of the unserved lawsuits. (App. 104-05).

3. The Show Cause Order.

Upon discovering this scheme perpetrated upon his docket, Judge Bennett issued an order abating the nonsuit requested by Petitioner. (App. 80). His order set a hearing relating to transfer and consolidation of the cases, and ordered counsel to show cause why he should not be sanctioned for violation of the rules. (App. 82-83). Though the rules allow for the transfer of cases (App. 19-20), that such a remedy exists does not foreclose the imposition of sanctions. Petitioner cites no authority for the proposition that transfer of a case is the exclusive remedy for misconduct. Indeed, Petitioner offers no case interpreting the rules to allow transfer in similar circumstances.

The "show cause" order gave Petitioner more than a month's notice of the hearing. (App. 82-83). The show cause order gave Petitioner notice that sanctions were being considered for the misconduct described above. Petitioner challenged the order by filing a motion for leave to file a petition for writ of mandamus in the intermediate state appellate court, which was rejected. (App. 104).

4. The Hearing.

Petitioner, represented by counsel, appeared and testified at the "show cause" hearing. (App. 34-35; 48). Petitioner's counsel began the hearing with objections; however, Petitioner never objected that a different judge should be hearing the matter nor did Petitioner move for the appointment of a different judge. (App. 36, *et seq.*). Furthermore, Petitioner never complained that, because

this was allegedly a criminal contempt matter, the state carried the burden of proof of proving misconduct beyond a reasonable doubt. *Id.*

Petitioner admitted to the filing of the 17 lawsuits and the nonsuit of 16 of the cases. (App. 48-49). Petitioner also admitted that this scheme was for the purpose of obtaining a particular district judge to hear the case. (App. 72-73).

The hearing was conducted in a dignified question and answer format. (App. 35-79). At one point Petitioner became disrespectful of the Court and he recognized this and promptly apologized. (App. 73; 75). Indeed, Petitioner's repeated assertions that Judge Bennett "took personal" Petitioner's misconduct is nowhere reflected in the record.[1] Petitioner's own testimony admits Judge Bennett's impartiality. (App. 76).

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[1] This Court discussed the effect of a judge's personal feelings regarding a contemnor in *Ungar v. Sarafite*, 376 U.S. 575 (1964). In *Ungar*, this Court held that the record in that case "does not leave us with an abiding impression that the trial judge permitted himself to become personally embroiled with petitioner." *Id.* at 586. In that case, the trial judge had gone as far as calling the contemnor "not only contemptuous, but disorderly and insolent," *id.* at 580, and accused the contemnor of "malingering," *id.* at 597. This Court then proceeded to uphold a finding of contempt.

In a case such as the one at bar – where a judge made no commentary whatsoever and where the record is completely absent of any evidence of bias – a defendant should not be able to allege bias on appeal in an effort to overturn a finding of contempt. As in *Ungar*, the hearing before Judge Bennett "was conducted dispassionately and with a decorum befitting a judicial proceeding." *Ungar* at 587.

The hearing is perhaps most significant insofar as it reveals quickly and clearly that Petitioner failed to preserve the argument currently being made to this Honorable Court. Petitioner never objected that a different judge should be hearing the sanctions matter, (App. 34-79; 90-98), though he spends several pages in his petition complaining that Judge Bennett should not have adjudicated the matter.[2] Furthermore, Petitioner *never* objected that the Court was imposing criminal instead of civil sanctions, and therefore the evidentiary standard should be on the state to prove his guilt "beyond a reasonable doubt," *id.*, though he repeatedly asserts in his petition that should have been done.

At the hearing, and in his reply to the "show cause" order, Petitioner complained that the Trial Court lacked jurisdiction because (1) Petitioner had filed the "notice of nonsuit," and (2) because the cases had been removed to federal court. *Id.* Furthermore, Petitioner complained of lack of due process based on the alleged lack of adequate notice in the show cause order. *Id.* However, the arguments made in this Court about "criminal sanctions" and a burden to prove guilt "beyond a reasonable doubt" were not raised in the Trial Court, and indeed were never

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[2] In other cases before this Court, contemnors had objected when a judge, who witnessed the original contemptuous conduct, later adjudicated the contempt proceeding. *See, e.g., In Re Murchison*, 349 U.S. 133, 135 (1955); *Ungar v. Sarafite, supra*, 376 U.S. at 581. In *Ungar*, this Court expressly stated that this issue was only being addressed because the issue had been preserved in a lower court. *Ungar*, 376 U.S. at 583. As this issue was not raised in the Trial Court, this Court should refuse certiorari.

raised in the Thirteenth Court of Appeals, (App. 107-132), nor in the Supreme Court of Texas. (App. 150-160).

Furthermore, Petitioner repeatedly complains that he was not informed as to the amount of the sanctions being contemplated at the November 10th hearing, though the record clearly indicates that Petitioner was informed of the specific sanctions on that day. (App. 79). Petitioner made no effort to add testimony, have the matter heard or reheard by a different judge, nor complained about the burden of proof, before the Judge issued the sanctions order, almost two months later. (App. 99).

B. The Appeals.

The Thirteenth Court of Appeals agreed with Petitioner that the Trial Court did not have jurisdiction because Petitioner had filed a notice of nonsuit. Even though it had concluded there was no jurisdiction, the appellate court offered dicta concluding that due process was violated based on the "separation of powers" argument that had first been raised at the Court of Appeals. (App. 12-13; 138-39). It is relevant to note that not a single federal case was cited by Petitioner when seeking review from the Court of Appeals, and the "criminal sanctions burden of proof" argument, now made, was never mentioned. (App. 112-114; 127-131).

The Texas Supreme Court, consistent with various of its opinions, held that the Trial Court had jurisdiction because there had been no order of dismissal after the notice of nonsuit. (App. 6-8). Furthermore, the Texas Supreme Court held that the Trial Court continued to have jurisdiction over the sanctions issues, though the

case had been removed to federal court. (App. 8-12).[3] Petitioner no longer challenges the Trial Court's jurisdiction. Instead, Petitioner challenges the Texas Supreme Court's holding that due process was not violated. Petitioner complains that the Texas Supreme Court "wholly failed to address the due process implications . . . ". (Petition for Writ of Certiorari, p. 15). However, in making such attack, Petitioner ignores that the only due process challenges being made by Petitioner were indeed addressed by the Texas Supreme Court.

Specifically, the Texas Supreme Court: (1) noted the inherent power to discipline attorney misconduct, (2) cited counsel's admitted abuse of the judicial process, and (3) explained that adequate notice of the Court's intent to consider sanctions was given. (App. 12-13). This discussion by the Texas Supreme Court specifically addressed Petitioner's limited due process challenge, which only challenged the Trial Court's authority to issue *sua sponte* sanctions and the notice provided by the show cause order. (BIO.App. 22-26).

REASONS FOR DENYING THE WRIT

The petition's factbound claim that the due process clause was somehow violated should be denied for a variety of reasons, including:

[3] The cases had been removed to the federal district court; they were later dismissed based on the doctrines of comity of nations and *forum non conveniens*. Such dismissal was affirmed. *See Flores v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997).

a. Complaints about Respondent hearing the sanctions matter were not preserved.

Petitioner never requested that a judge, other than Judge Bennett, conduct the hearing on the show cause order. (App. 34-79; 90-98). Almost the entirety of Petitioner's petition is dedicated to characterizing Judge Bennett as having acted as the investigator, complainant, prosecutor, judge, and beneficiary[4] in this case. However, Petitioner ignores that he never objected to Judge Bennett hearing this matter. As this Honorable Court has explained:

> "If the claim was not raised or addressed in federal proceedings, below, our usual practice would be to decline to review it."

Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); *see also Yee v. Escondido*, 503 U.S. 519,

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[4] Respondent objects to Petitioner's characterization that Respondent has control over or otherwise derives any benefit from the sanction. (Petition pp. 24-25). Contrary to Petitioner's assertion, Respondent did not order the sanction "awarded [to] his court." (Petition p. 24). Rather, the sanction was made payable to the "Clerk of the Court," who collects such sanctions for Nueces County – not the 319th District Court. There is no evidence before this Court that Respondent has any control over the funds or that Respondent was a "beneficiary," as asserted by Petitioner. This Court has noted that, where fines make up only a small portion of the budget or salary of a public official and are paid to the governmental unit generally and not to that official or his office, the potential for bias "is exceptionally remote." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (addressing bias of administrative official charged with prosecutional-type duty of assessing fines). The bias in this case is even more remote.

533, 112 S.Ct. 1522, 1531 (1992). Indeed, within the specific context of contempt, this Court has recognized that before a complaint about the Trial Judge may be considered by this Court, Petitioner-Contemnor must have raised the challenge to the Judge hearing the contempt at the trial court. *Ungar v. Sarafite, supra,* 376 U.S. at 581, 583. Because Petitioner did not raise this issue below, certiorari should be denied.

b. Complaints related to the burden of proof and "criminal contempt"[5] were not preserved.

Petitioner repeatedly asserts that the sanction imposed was a "criminal sanction" and therefore the state should have been required to carry the burden of proof of showing his guilt beyond a reasonable doubt. Again, however, such claim is not preserved. This contention was not made at the Trial Court (App. 34-79; 90-98), was not made at the Court of Appeals (App. 107-132), and was not even made at the Texas Supreme Court. (App. 150-160). Nevertheless, Petitioner would have this Court

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[5] Respondent does not agree with Petitioner's contention that a "criminal" sanction was imposed. Indeed, the sanction was relatively minor in light of the purported multimillion dollar toxic tort case involving 500 plaintiffs Petitioner was pursuing. Further, Petitioner's admitted payment of $2,700 in filing fees (App. 71-72), to engage in this scheme, evidences that the sanction of $10,000 to Petitioner is trivial. It is relevant to note that Petitioner is not a small solo practitioner, but rather has 20 employees. (App. 53). Additional discussion of this issue should not be required in light of the Petitioner's failure to preserve the point.

reverse the Texas Supreme Court premised upon this argument that has never even been presented to the state courts. Such appellate ambush is obviously inconsistent with this Honorable Court's certiorari practice.

c. There are no conflicting cases nor does this case involve statutory interpretation.

Petitioner fails to identify any conflicting opinions nor any statute that he claims to be in violation of the federal constitution. Instead, Petitioner's complaint is an amorphous assertion of due process violations applied in this particular circumstance with obviously unique facts. This factbound inquiry is not worthy of certiorari.

d. The Trial Court's order of sanctions was proper.

In the case before the Court, the Petitioner was engaged in flagrant abuse and intentional disregard of local rules designed to properly allocate and distribute cases within Nueces County.[6] (App. 12-13; 99-106). Inherent power to sanction for such abuse has been recognized by courts throughout Texas. *See Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-399 (Tex. 1979); *Lawrence v. Kohl*, 853 S.W.2d 697, 700 (Tex.App. – Houston [1st Dist.] 1993, no writ); *Kutch v. Del Mar College*, 831 S.W.2d 506 (Tex.App. – Corpus Christi, 1992 no writ). Furthermore, this Honorable Court has recognized such inherent

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[6] Petitioner's contention that there was no *actus reus* is inexplicable in light of the misconduct described above.

powers as exercised by the Trial Court. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

Such inherent power includes the power to "discipline attorneys who appear before [the court]." *Id.* at 43, 111 S.Ct. at 2132 (quoting *Ex Parte Burr*, 22 U.S. (9 Wheat), 529, 531, 6 L.Ed. 152 (1824)). Indeed, this Court in *Chambers* recognized that courts generally may act sua sponte in imposing sanctions under the rules. *Id.* at 43, 111 S.Ct. at 2132. Courts on occasion will act on their own initiative. *See, e.g., Ungar v. Sarafite*, 376 U.S. 575, 583-588 (1964) (trial court holding witness in contempt upheld); *Sacher v. United States*, 343 U.S. 1, 11-12 (1952) (federal law on criminal contempt does not limit judge to role as "an accuser or complaining witness in a proceeding before another judge"); *Markwell v. County of Bexar*, 878 F.2d 899, 900 (5th Cir. 1989) ("*Sua sponte*, the court imposed on Myers a fine of $1,000 in Rule 11 sanctions for filing the two motions, and ordered that Myers not charge his client for any time spent in filing them."); *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146, 149 (D.Puerto Rico 1994) (The Trial Court sanctioned attorneys on both sides of the case "to remind the attorneys of their duties as officers of the Court, as well as to ensure that the direct Orders of the Court would be followed in the future."); *Resolution Trust Corporation v. Dabney*, 73 F.3d 262, 265 (10th Cir. 1995) ("The district court then requested briefs from both parties addressing any factors appropriate to the court's determination of the amount of a proper sanction that will deter future misconduct.' "); *Marley v. Wright*, 968 F.2d 20, 1992 WL 149922 (10th Cir. 1992) ("The district court *sua sponte* issued an order to show cause why sanctions

should not be imposed upon Marley for suing Wright, Harbour and Fowler.").

Due process requires that the court give notice of its intention to consider *sua sponte* sanctions, and that the offending party be given an opportunity to be heard. *Ungar v. Sarafite, supra,* 376 U.S. at 589 ("show cause" order and hearing provided adequate notice and opportunity to be heard); *Julian v. Zeringue,* 864 F.2d 1572, 1575 (Fed.Cir. 1989) ("If the court intends to sanction an attorney *sua sponte,* due process is satisfied by issuance of an order to show cause why sanctions should not be imposed and by providing an opportunity to respond."); *Braley v. Campbell,* 832 F.2d 1504, 1514 (10th Cir. 1987) ("When the court intends to consider such sanctions *sua sponte,* due process is satisfied by issuance of an order to show cause why a sanction should not be imposed and by providing a reasonable opportunity for filing a response."). This was not a case in which the Trial Judge imposed sanctions without the benefit of notice and an opportunity to be heard.

The Petitioner was given notice via the Court's October 2, 1995 order abating the dismissal and setting the hearing on sanctions. (App. 80-83). The Petitioner responded. (App. 90-97). On November 10, 1995, the hearing on sanctions was heard, and Petitioner had an opportunity to present arguments and defend himself. (App. 34, *et seq.*). Sanctions were not immediately imposed. Instead, a thoughtful order detailing the findings and conclusions of the Court was made on January 4, 1996. (App. 99-106). Due process was satisfied insofar as the sanctioned parties were given notice and an opportunity to be heard.

It is true that the Trial Court initiated the consideration of sanctions and inquired about the misconduct at the "show cause" hearing. However, in this action the defendants were never served. Additionally, the Plaintiff/Petitioner subsequently filed a "notice of nonsuit". The defendants' attorney did appear at the hearing on sanctions, pursuant to the Court's order. (App. 37). The defendants made objections to the actions of the Plaintiffs' attorney, stating that such actions were an abuse of the system, constituted forum shopping, and adversely affected the rights of the defendants. (App. 78). Yet, these defendants did not want to make a general appearance and file motions for sanctions because, having removed to federal court, it was their position they were no longer parties to the case. They were never served and the Plaintiff had filed a notice of nonsuit. Therefore, there was no party available to pursue sanctions. In this unique circumstance,[7] the adverse litigant is not going to be the proponent of sanctions. No one would enforce the rules of court and protect the system from an abuse of process unless the Judge conscientiously proceeds with notice of a "show cause" hearing and then gives Petitioner an opportunity to be heard.

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[7] The cases cited by Petitioner do not involve such unique circumstances where the adverse litigant has never been served and the plaintiff has filed a notice of nonsuit. Thus, the Petitioner's authorities are distinguishable. The sanctions orders in Petitioner's cases also involve many other deficiencies not present in this case. A more analogous situation existed in *Ungar v. Sarafite, supra.* In that case the court was concerned with contemptuous conduct by a witness in the case. Neither party to the underlying proceedings participated in the post-trial show cause hearing. The sanctions were upheld.

The Petitioner emphasizes the notion that the Judge acted both as prosecutor and judge, ignoring that the defendants, because they were never served and had been nonsuited, did not have an interest in actively pursuing the sanctions against the offending Petitioner. The Court acted neither as an adversary to any party, nor as an advocate of any party, but, rather, acted in protection of the orders of the Nueces County judges which were being abused by officers of the Court. *Cf. Ungar, supra.* Petitioner's position ignores that, in the absence of such vigilant judging, the system will be subject to abuses which will go unremedied and unpunished. The Petitioner should not be allowed to engage in such abusive tactics with impunity. The Trial Judge should not be relegated to sitting idly by as officers of the Court abuse the system. *Cf. Ungar, supra; Sacher, supra; Ex Parte Daniels,* 722 S.W.2d 707 (Tex.Cr.App. 1987). Good trial judges must be vigilant and conscientious enough to *sua sponte* protect the rule of law from abuses such as those committed by Petitioner.

CONCLUSION

For the above stated reasons, Respondent respectfully urges the Court to deny the Writ of Certiorari.

Respectfully submitted,

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TEXAS RULES OF CIVIL PROCEDURE

RULE 13. EFFECT OF SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule.

The amount requested for damages does not constitute a violation of this rule.

NO. 96-0598

IN THE SUPREME COURT OF TEXAS

THE HONORABLE MAX BENNETT, JUDGE OF THE 319TH JUDICIAL DISTRICT COURT, NUECES COUNTY, TEXAS,

RELATOR

vs.

THE THIRTEENTH COURT OF APPEALS,

RESPONDENT

****

RESPONSE OF ROBERT C. HILLIARD AND ANDREW SCHIRRMEISTER, III TO RELATOR'S PETITION FOR WRIT OF MANDAMUS

****

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ATTORNEY FOR REAL PARTIES IN INTEREST

CERTIFICATE OF PARTIES AND ATTORNEYS

The Relator, Respondent, and other Real Parties in Interest in this mandamus are as follows:

(1) **Relator** – Max Bennett, Judge of the 319th Judicial District Court of Nueces County, Texas, is the Judge of the Court in which the underlying lawsuit, styled

Timoteo Aguilar Coaguila and Maria Magdalena Llanos, Individually and as Next Friend of Regman Aguilar Llanos, a Minor vs. Southern Peru Copper Corporation, Asarco, Inc., Cerro Trading Co., Inc., Cerro Sales Corporation, The Marmon Corporation, The Marmon Group, Inc., Marmon Holdings, Inc., GL Corporation, Phelps Dodge Overseas Capital Corporation, Phelps Dodge Corporation, Phelps Dodge Refining Corporation, Phelps Dodge Industries, Inc., Newmont Gold Corporation, Newmont Mining Corporation, Inc., Billiton B.V., and Mitsui & Co., Ltd., Cause No. 95-4900-G, was filed. Relator was the Respondent in the prior mandamus action brought by the Real Parties in Interest and decided by Respondent, Cause No. 13-96-042-CV in the Court of Appeals, Thirteenth District of Texas. See Exhibit C.

(2) **Respondent** – Court of Appeals, Thirteenth Judicial District of Texas, known also as the Corpus Christi Court of Appeals and the Thirteenth Court of Appeals. The Thirteenth Court of Appeals, sitting in a panel comprised of Justices Dorsey, Hinojosa and Rodriguez, entered its Judgment and issued its Opinion on June 13, 1996, regarding the Order on Sanction of Attorneys dated January 4, 1996. The Thirteenth Court of Appeals can be found at the 10th Floor of the Nueces County Courthouse, 901 Leopard Street, Corpus Christi, Texas 78401.

(3) **Real Parties in Interest** – Robert C. Hilliard of Hilliard & Munoz, 719 S. Shoreline, Suite 600, Corpus Christi, Texas 78401; and Andrew C. Schirrmeister, III of Zummo & Schirrmeister, L.L.P., 2603 Augustus, Suite 1200, Houston, Texas 77057. Attorneys Hilliard and Schirrmeister were attorneys for the Plaintiffs in the

underlying action. The Real Parties in Interest were represented in the court of appeals by Eric Brown and Linda Breck of Brin & Brin, P.C., 1202 Third Street, Corpus Christi, Texas 78404. Eric Brown, attorney for the Real Parties in Interest, is of Martin & Associates, 707 W. 10th Street, Austin, Texas 78701.

(4) **Plaintiffs** – Timoteo Aguilar Coaguila and Maria Magdalena Llanos, Individually and as Next Friend of Regman Aguilar Llanos, a Minor. No issue on this mandamus is relevant to the Plaintiffs.

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NO. 96-0598

IN SUPREME COURT OF TEXAS

THE HONORABLE MAX BENNETT, JUDGE OF THE 319TH JUDICIAL DISTRICT COURT, NUECES COUNTY, TEXAS

RELATOR

vs.

THE THIRTEENTH COURT OF APPEALS 319TH JUDICIAL DISTRICT COURT, NUECES COUNTY, TEXAS,

RESPONDENT

FROM THE DISTRICT COURT OF NUECES COUNTY, TEXAS, 319TH JUDICIAL DISTRICT

RESPONSE OF ROBERT C. HILLIARD AND ANDREW SCHIRRMEISTER, III TO RELATOR'S PETITION FOR WRIT OF MANDAMUS

Real Parties in Interest, Robert C. Hilliard and Andrew C. Schirrmeister, III, file this, their response to Relator's Petition for Writ of Mandamus. Real Parties in Interest will show this Honorable Court that the Thirteenth Court of Appeals was correct in its determination that Relator had entered a sanctions Order against Hilliard and Schirrmeister in a lawsuit over which it had no jurisdiction and in a matter inconsistent with his role as judge. The decision of the court of appeals was correct because the Real Parties in Interest violated no rule of procedure, the trial court had no jurisdiction over the underlying case and the Relator violated the due process rights of the Real Parties in Interest.

I. STANDARD OF REVIEW

Although the Thirteenth Court of Appeals is the proper Respondent, the focus of the Supreme Court in its review is whether the trial court abused its discretion. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985).

II. STATEMENT OF FACTS

A. The Underlying Case

The underlying case from which this controversy arose was a personal injury action brought by three individuals who were harmed by emissions from the defendants' copper smelting operations in Ilo, Peru. The

plaintiffs sought monetary damages to compensate them for their injuries.

B. The Relator's Order and The Court of Appeals Ruling

The order at issue in this Original Proceeding is Relator's Order on Sanction of Attorneys dated January 4, 1996 (Exhibit A). Relator's order makes findings that the Real Parties in Interest violated the Local Rules of Practice of the district courts of Nueces County, and the Texas Rules of Civil Procedure, specifically Rules 1 and 13. The Relator ordered the Real Parties in Interest, as sanctions, to pay to the clerk of the court the sum of $10,000.00 each by February 5, 1996. The Real Parties in Interest filed a Petition for Writ of Mandamus in the court of appeals, complaining of the trial court's order. After hearing argument, the court of appeals determined that the trial court had improperly sanctioned the Real Parties in Interest (Exhibit B).

C. Events Prior To Relator's Order

On August 30, 1995, plaintiffs' counsel, Hilliard & Munoz and Zummo & Schirrmeister, filed a lawsuit that was assigned to Relator's court by the District Clerk (Exhibit C) . On the same day and on August 31, 1995, the same lawyers filed sixteen other lawsuits, each involving different plaintiffs. On September 5, 1995, each plaintiff filed a Notice of Nonsuit and abandoned his/her claims except the plaintiffs in the case pending in the 105th district court. The plaintiffs in the lawsuit filed in Relator's court and the other plaintiffs who nonsuited and

abandoned their claims were not plaintiffs in the action filed in the 105th District Court.

On October 2, 1995, Relator entered a *sua sponte* order that attempted to abate plaintiffs' nonsuit previously filed in Relator's court and the nonsuits by other plaintiffs in other courts (Exhibit D). In that order, Relator also commanded Real Parties in Interest to appear and show cause why:

> The cases filed in the other District Courts of Nueces County subsequent to August 30, 1995, at 3:24 p.m. and having the same defendants and the same factual allegations of fault should not be transferred to and consolidated in this cause in the 319th Judicial District Court; and
>
> Why plaintiff's counsel, as an officer of the court, should not be sanctioned for intentionally violating the Rules of the Court and standing orders of the District Courts of Nueces County.

On October 16, 1995, the defendants removed the dismissed cases to the United States District Court for the Southern District of Texas, including the underlying case which had been originally filed in Judge Bennett's court. (Exhibit E, Notification of Removal in No. 4900-G Timoteo Aguilar Coaguila and Maria Magdalene Llanos, Individually and as Next Friend for Regman Aguilar Llanos, a Minor vs. Southern Peru Copper Corporation, et al, 319th District Court, Nueces County, Texas. Following their removal, plaintiffs filed notices of prior nonsuit or in the alternative, Fed. R. Civ. P. 41(a), Notice of Dismissal (Exhibit F).

Prior to the hearing on Relator's sua sponte motion, Real Parties in Interest, on behalf of their clients, filed a

Petition for Writ of Mandamus against the Relator. In that mandamus action, the Plaintiffs claimed that the trial court was without authority to abate a voluntarily dismissed case. (Exhibit G). This Petition was styled *Timoteo Aguilar Coaguila and Maria Magdalene Llanos, Individually and as Next Friend for Regman Aguilar Llanos, a minor. v. The Honorable Max Bennett Judge of the 319th Judicial District Court, Nueces County, Texas;* Cause No. 13-95-00473-CV. On November 2, 1995 the Thirteenth Court of Appeals granted the Motion for Leave to File Petition for Writ of Mandamus[1] (Exhibit H).

Relator ordered sanctions against the Real Parties in Interest despite the fact that the case filed in his court had been nonsuited and removed to federal court.

III. ARGUMENT

A. The Trial Court Had No Jurisdiction Over the Case

Real Parties in Interest sought a writ of mandamus from the Thirteenth Court of Appeals to direct Relator to vacate his January 4, 1996 Order On Sanctions Of Attorneys because the trial court had no jurisdiction to act in the case. The Relator's Order clearly indicated that it was entered in the dismissed cause. Because the Relator's January 4, 1996, order was entered in a nonsuited case and had also been removed to federal court, the order was void. Mandamus was the proper method by which to attack a void judgment or order in the court of appeals.

---

[1] The court of appeals dismissed the petition as moot on July 1, 1996.

Thomas v. Miller, 906 S.W.2d 260, 262 (Tex.App. – Texarkana 1995, orig. proceeding).

The underlying case was filed with the District Clerk of Nueces County on August 30, 1995. On September 5, 1995, plaintiffs filed a nonsuit of this action. At the time plaintiffs nonsuited this cause, no defendant had a claim for affirmative relief nor were any motions for sanctions by anyone pending at that time. The nonsuit was effective at the moment it was filed and results in an immediate dismissal of the entire lawsuit. *Miller v. Armogida,* 877 S.W. 2d 361 (Tex. App. – Houston [1st Dist.] 1994, writ denied). In the absence of a claim by a defendant for affirmative relief or sanctions, a trial court's refusal to enter an order of nonsuit violates a ministerial duty and should be corrected by mandamus. *Hooks v. Fourth Court of Appeals,* 808 S.W.2d 56 (Tex. 1991).

Relator argues in his Petition for Writ of Mandamus that he retained jurisdiction over the case because no dismissal order had been signed by him even though plaintiffs had exercised their absolute right to nonsuit their case. In his Petition, however, Relator fails to inform this Court that this very case was removed to federal court by the defendants on October 18, 1995. As a result of the removal, the trial court was forbidden, by federal law, from taking any further action in the underlying case. At the time the defendants completed the required steps to complete removal, Relator's jurisdiction ceased over this cause. Steamship *Co. v. Tugman,* 106 U.S. 118, 122, 1 S.Ct. 58, 60, 27 L.Ed. 87 (1882). Any action taken by a state court after removal is null and void. The jurisdiction of the state court is not restored unless and until the federal court remands the case. *E. D. Systems Corp. v.*

Southwestern Bell Telephone Co., 674 F.2d 453, 457 (5th Cir. 1982). Relator's attempt to exercise jurisdiction over the cause after it was removed to federal court was simply a void act.

Even if this case had not been removed to federal court, Relator's argument will not withstand scrutiny. The Real Parties in Interest filed a mandamus with the court of appeals on November 1, 1995, requesting the court of appeals to order Relator to vacate his order of abatement. If Relator retained jurisdiction over this case, as he argues, it is simply because he did not comply with the ministerial act of dismissal. The cases Relator cites as authority for his position are inopposite. Those cases each involve the issue of appealability. This case does not. Taken to its logical conclusion, Relator's argument would revive all Texas cases which have been nonsuited for which no order of dismissal had been signed regardless of how old that case might be. Relator's argument would also allow any Texas court to retain jurisdiction over any case for the sole purpose of extending its plenary power. This would be improper. *See Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995).

B. The Relator's Inherent Authority to Sanction is Dependent Upon Jurisdiction

Relator may not base its decision upon, "its statutory, common law and inherent powers and jurisdiction" because it had no jurisdiction over the underlying case at the time it acted. *In Hjalmarson v. Langley*, 840 S.W.2d 153 (Tex.App. – Waco 1992, orig. proceeding), the court considered the issue of a trial court's inherent power to

sanction. The appellate court opined that a court's inherent judicial power does not confer jurisdiction where none preexists by statutory or constitutional grant. The inherent power of a court to sanction has its ancient roots in the court's jurisdiction and a court cannot lose its jurisdiction and yet retain it to act at the same time. *Id.* at 155. Likewise, this Court in *Eichelberger v. Eichelberger,* 582 S.W.2d 395, 399 (Tex. 1979), stated that a court has no power to take jurisdiction of a case when that jurisdiction has been granted to another court.

In this case the trial court did not retain jurisdiction. Its inherent power to sanction is reliant upon its jurisdiction. When the Relator lost jurisdiction over the case upon Plaintiffs' Notice of Nonsuit, or in the alternative, when the case was removed to federal court, it correspondingly lost its inherent power to sanction.

Likewise, the court had no power to sanction under "statutory or common law." In *Kutch v. Del Mar College,* 831 S.W.2d 506, 509 (Tex.App. – Corpus Christi, 1992, no writ), the court of appeals held that Texas courts have inherent power to sanction bad faith conduct during litigation. Again, this presupposes that a trial court has jurisdiction over the cause in which it is issuing the sanctions.

The *Hjalmarson* court recognized that its holding was in conflict with the San Antonio court in *Wolma v.* Gonzalez, 822 S.W.2d 302 (Tex.App. – San Antonio 1991, orig. proceeding). The *Hjalmarson* court stated that the *Wolma* decision can not be squared with established legal principles relating to jurisdiction and rejected its reasoning. All other courts of appeals that have considered the

issue have rejected the *Wolma* case and have adopted the reasoning in *Hjalmarson*, See e.g. *Warfield Electric v. Harry Hines Property Venture*, 871 S.W.2d 273 (Tex.App. – Eastland 1994, no writ); *Jobe v. Lapidus*, 874 S.W.2d 764 (Tex.App. – Dallas 1994, writ denied); and *Schexnider v. Scott & White Memorial Hospital*, 906 S.W.2d 659 (Tex.App. – Austin 1995, writ filed).

The trial court's *sua sponte* attempt to create jurisdiction by attempting to abate the nonsuit on October 2, 1996, likewise fails. Blacks Law Dictionary, 4th Ed., Revised, defines abate as to "throw down, to beat down, destroy, quash, to do away with or nullify or lessen or diminish". A trial court cannot abate an action that has already been dismissed or is removed to federal court. Because a plaintiff's right to take a nonsuit is absolute and because the case was removed to federal court and dismissed there as well, the Relator's attempt to abate the case is also a nullity regardless of the nomenclature used. *Greenberg v. Brookshire*, 640 S.W.2d 870 (Tex. 1982).

The trial court's attempt to retain Jurisdiction through abatement is also a nullity because there was never an attempt to reinstate the cause pursuant to Tex. R. Civ. P. 165a. This Rule does not authorize or contemplate a reinstatement on the court's own motion. It requires a verified motion filed by one of the parties within thirty days of the dismissal or nonsuit. Neither the plaintiffs nor any defendant moved for reinstatement. In addition, no signed order of reinstatement was entered by the court within 75 days of the nonsuit as required by Tex. R. Civ. P. 165a(3).

This Court, in *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 172 (Tex. 1993), held that a trial court does have inherent and statutory power to discipline errant counsel for improper trial conduct in the exercise of its contempt powers. The trial court did not utilize its contempt powers in this case. If it did, it was not in compliance with statutory authority governing such. This Court also indicated in Remington that trial counsel are subject to disciplinary action for improper conduct. Relator did not utilize this avenue either.

In summary, the trial court could not grant sanctions under its statutory, inherent, or common law power because it had no jurisdiction over the cause.

IV. SANCTIONS ARE IMPROPER BECAUSE THE REAL PARTIES IN INTEREST VIOLATED NO RULE OF PROCEDURE

While it is clear that Relator was offended by the Real Parties in Interest actions in this case, they committed no sanctionable offense. Relator, in his order, found that the Real Parties in Interest knowingly and intentionally violated the local rules of practice which provide for random assignment of cases.

The court further found that Relator violated local rules of practice by filing notices of nonsuits which attempted to deprive the defendants of their right to present or defend all of the cases in a particular court. The court further found that the Relator violated Rule 13 by filing the underlying case in bad faith. The trial court improperly determined that the Real Parties in Interest

violated Rule 1 in that they attempted to reserve exclusively unto themselves the right to have their case heard in a particular court. The court of appeals correctly determined that Relator improperly granted sanctions. No rule of procedure or local rule was violated.

A. Rule 13 Sanctions

The trial court granted sanctions under Tex.R.Civ.P. 13, stating that the case was filed in bad faith. Rule 13 provides, in part:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purposes of harassment. . . .
>
> No sanctions under this rule may be imposed except for good cause, the particulars which must be stated in the sanction order. "Groundless" for purposes of this rule means that no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.

Clearly, Rule 13 allows for sanctions only if a suit is brought groundlessly **and** in bad faith. There was absolutely no evidence before the trial court to indicate that the underlying lawsuit was groundless, or brought in bad faith (Exhibit I). In fact, Relator testified that this case was brought in response to serious injuries and death of citizens of Peru which were caused by the negligence of

the defendants in the underlying case (Exhibit I at p. 24). The language of the rule indicates that in order to be sanctionable under Rule 13, the action must be groundless **and** brought in bad faith. The rule does not say that the sanctions may be imposed for an action that is groundless *or* brought in bad faith. The purpose of the rule is to check abuses in the pleading process. *Monroe v. Grider,* 884 S.W.2d 811, 817 (Tex-App. – Dallas 1994, writ denied). The language of the rule provides that no sanctions be imposed except for good cause shown and the trial court must enumerate the particulars of good cause in the sanction order. *GTE Communications Systems Corp. v. Curry,* 819 S.W.2d 652 (Tex.App. – San Antonio 1991, orig. proceeding).

The trial court's order makes no finding of groundlessness. It further fails to state facts or particulars of good cause. The evidence before the trial court showed that the pleadings were substantiated in fact and law and were brought in good faith. Further, the trial court's order does not show good cause as is required by the specific language of the rule. Courts presume that papers are filed in good faith and a party moving for sanctions for violation of Rule 13 has the burden of overcoming the presumption. See *GTE Communications Sys. Corp. v. Tanner,* 856 S.W.2d 725, 731 (Tex. 1993). Because Relator assumed the responsibility of the sanction, he correspondingly assumed the duty to overcome the presumption.

Realtor clearly abused its discretion in granting sanctions under Tex.R.Civ.P. 13 because there was no evidence before the trial court that the lawsuit brought was groundless and brought in bad faith and there was no finding by the trial court to that effect. Further, a trial

court may not impose Rule 13 sanctions after it loses jurisdiction. *Vera v. Perez*, 884 S.W.2d 182, 184 (Tex. App. – Corpus Christi 1994, no writ). In summary, the trial court's order does not show good cause for granting sanctions under Tex.R.Civ.P. 13 because there was none.

B. Rule 1 Sanctions

The trial court was also incorrect in granting sanctions against Real Parties in Interest based upon Tex.R.Civ.P. 1. Rule 1 reads, in part:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.

Rule 1 has as its broad purpose a fair, just, equitable and impartial adjudication of the rights of litigants. The language of the rule does not proscribe any sanctions for the failure of a party to comply with the rule. Further, no Texas cases have interpreted the rule with respect to sanctions or the types of conduct which are violative of the rule and would warrant sanctions. In order to uphold the grant of sanctions under Tex. R. Civ. P. 1, this Court would necessarily be required to infer that some party to the litigation would be unable to get a fair trial in the district court in which the case was eventually filed. The Relator clearly abused its discretion in granting sanctions under that rule for the reason that there was no evidence before the court that Relator violated the rule or that a fair trial would not be possible in the court in which the case was eventually filed. Regardless, the rule does not

proscribe any sanctions for its violation. There was nothing before the trial court to show that Real Parties in Interest were in any way attempting to circumvent an impartial or unfair adjudication of the rights of the litigants. The defendants chose to remove their cases to federal court rather than exercise their state court rights. Again, the court's inherent power to sanction under Rule 1, if it existed, expired when its jurisdiction over the case expired. Relator clearly abused its discretion in granting sanctions under Rule 1.

C. VIOLATION OF LOCAL RULES OF PRACTICE

The Relator also found that the Real Parties in Interest had violated local rules of practice which provide for the random assignment of cases. A review of the rules which concern the random assignment of cases clearly shows that those rules were not violated by the Real Parties in Interest in this case (Exhibits J and K). Unlike the county court rules, the rules of the district court, which were made with the authority of the Relator and the other district judges, do not even proscribe sanctions for violation of the rules. Regardless, the evidence before the court did not show any violation of these rules. The district judges of Nueces County could have promulgated rules to prohibit the actions of the Real Parties in Interest, but they have not. Again, any inherent power of the court to sanction under the rules would have necessarily expired when its jurisdiction over the case expired.

V. SANCTIONS WERE UNCONSTITUTIONALLY IMPOSED

A. Due Process of Law – Notice

The trial court's sanction order is void and constitutes an abuse of discretion for which there is no adequate remedy at law because the order imposed sanctions violative of Real Parties in Interest's rights of due process under the Fifth and Fourteenth Amendments of the United States Constitution and Article One, Section 19, of the Texas Constitution. A trial court must follow the due process procedures provided by law in order to sanction an attorney or hold him or her in contempt. *Kidd v. Lance*, 794 S.W.2d 586 (Tex.App. – Austin 1990, orig. proceeding). Due process safeguards requiring adequate notice and hearing are the same whether the trial court is considering fining an attorney $500.00 for contempt of court or imposing a $10,000.00 fine and calling it a sanction. *Id.* at 588.

In *Kidd*, the trial court sanctioned a defendant for purportedly violating a motion in limine. The appellate court determined that mandamus was the only remedy available to Relator to address the sanctions issue. *Id.* at 587. The court opined that it could find no foundation whatsoever for any of the sanctions assessed against the defendant. *Id.* at 588. The Real Parties in Interest, in *Kidd*, argued that the court's order was not imposed for contempt pursuant to Tex. Gov't. Code Ann. § 21.002(d) but was a sanction under Tex. Gov't. Code Ann. § 82.061 (Vernon 1988). The court of appeals held that Relators were entitled to the due process safeguards of § 21.002, regardless.

Likewise, in this case, Respondent did not comply with the procedural requirements set forth in § 21.002 of the Government Code. Real Parties in Interest filed written objections to the court's attempt to sanction them prior to the November 10, 1995, hearing (Exhibit L). The court's October 2, 1995, *sua sponte* order, in effect, charged them with a violation of Rule 3.1 and 3.13 of the Local Rules of Administration of the District Courts of Nueces County. As Relator pointed out in writing prior to the hearing, the October 2, 1995 Order was vague and ambiguous and failed to apprise Real Parties in Interest of the act or acts alleged to be in violation of the local rules.

The trial court's orders here are an attempt to sidestep the safeguards of due process by way of nomenclature. Courts have long held that in order for a court order to be enforceable by contempt, the order must set out in clear and unambiguous language exactly what duties or obligations are imposed upon the alleged contemnor. *Ex parte Kraus*, 863 S.W.2d 104 (Tex.App. – Corpus Christi 1993, no writ). Contemptuous acts must be directly contrary to the expressed terms of a court order and when a court seeks to punish by fine, arrest, or imprisonment for disobedience of an order, that order must carry no uncertainty and must be not susceptible of different meanings or constructions. *Id.* at 106; *Ex parte Blasingame*, 748 S.W.2d 444 (Tex. 1988); *Ex parte Blanchard*, 736 S.W.2d 642 (Tex. 1987).

The Court's October 2, 1995, *sua sponte* order falls short of those due process safeguards by failing to set out with specificity the exact rules of court the Real Parties in Interest were alleged to have violated, failed to give the Real Parties in Interest notice under what authority the

court was attempting to sanction or punish them, and failed to state what the parameters of such sanctions would be. There is absolutely no justification for a distinction between sanctions and fines under the Constitution.

The trial court's Order of October 2, 1995, was nebulous. It mentioned Local Rules 3.1 and 3.13 and the Standing Orders of the District Court as giving the Court authority to require Real Parties in Interest to show cause why they should not be sanctioned for intentionally violating the Rules of Court and Standing Orders of the Court. This was clearly insufficient under the Government Code to provide notice. Rule 3 of the Local Rules of Nueces County provides that all cases are to be filed, docketed, and assigned pursuant to Rule 10(b) of the Rules of Judicial Administration of the Supreme Court of Texas and §§ 74.093, 74.121, and 75.011(i) of the Texas Government Code. Rule 3.1 allows for transfer of cases within the courts after assignment to a particular court. These rules do not, in any way, provide the courts with the authority to sanction in the event that these Rules are violated. Further, the evidence before the Respondent in its hearing on November 10, 1995, do not in any way show that the Rules were violated.

For these reasons, the Thirteenth Court of Appeals was correct in its determination that the Relator improperly ordered sanctions.

B. Constitutional Violations

The court of appeals determined that the trial court's order of January 4, 1996, was inconsistent with his role as

judge. To act as prosecutor and judge is in violation of Article 2, Section 1 of the Texas Constitution and is a violation of separation of powers under the United States Constitution. It is axiomatic in our system of jurisprudence and, under both the Texas and the United States Constitutions, that a court must be a neutral arbitrator of both the facts and the law. In this case, the Relator assumed the role of both the prosecutor and judge and as such, the Court's January 4th order is a violation of these core principles.

The record shows that no defendant in this cause was served or filed an answer prior to the plaintiff taking the nonsuit nor within the thirty days following the nonsuit in which the court retained plenary power. The "charging" instrument in this case was the court's *sua sponte* order which in itself made findings and what appear to be conclusions. At the court's hearing on November 10, 1995, the court acted as prosecutor and judge calling its own witnesses and then pronouncing judgment on its own evidence. The first time any party, other than Real Parties in Interest, appeared was at that hearing when Mr. Eduardo Roberto Rodriguez appeared on behalf of Southern Peru Copper Company, one of the original defendants.

Again, in *Kidd v. Lance*, the trial court sanctioned a party and its attorney for alleged violations of a motion in limine. The Real Parties in Interest argued that the sanction was for behavior under Section 82.061 of the Texas Government Code and thus the due process safeguards of § 21.002 of the Government Code were not applicable. The court rightfully rejected this argument

and held that such safeguards were required. Those safeguards include the right to have another judge appointed to hear the matter. At a minimum, the trial court in this cause should have followed the procedural safeguards set out in § 21.002 of the Government Code.

It would further be violative of the United States Constitution for a state court to continue to act in a case for which the federal court has exclusive jurisdiction.

VI. CONCLUSION AND PRAYER FOR RELIEF

The court of appeals was correct in its determination that Relator's order was void because of lack of jurisdiction. The court of appeals properly ruled in this case. Accordingly, this Court should deny Relator's Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus. Real Parties in Interest further pray for such other and further relief to which they may be justly entitled.

Respectfully submitted,

By /s/ Eric Brown
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ATTORNEY FOR REAL PARTIES IN INTEREST

CERTIFICATE OF SERVICE

I hereby certify that on this 5 day of July 1996, a true and correct copy of the foregoing Response has been sent to all parties to this proceeding.

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No. 97-2011

In The

Supreme Court of the United States

October Term, 1997

IN RE ROBERT C. HILLIARD,

Petitioner.

On Petition For Writ Of Certiorari
To The Supreme Court Of Texas

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY

A. Judge Bennett Concedes Mr. Hilliard Correctly Characterizes the Facts of This Case.

Mr. Hilliard neither misstated nor omitted a single fact mentioned in Respondent's Brief in Opposition ("Opposition Brief" or "BIO"). (*Compare* BIO at 1-8 *with* Petition at 2-16.) In his Opposition Brief, Judge Bennett contends to the contrary, stating that Mr. Hilliard has "mischaracterized" the facts of the proceedings below. (BIO at 1.)[1] Notwithstanding this conclusory statement, however, Judge Bennett implicitly concedes that Mr. Hilliard's Petition correctly presents the facts of this case because Judge Bennett fails to identify even one instance of mischaracterization. In fact, Judge Bennett relies almost entirely upon the appendix materials provided by Mr. Hilliard and depicts the case by discussing the precise facts put forward in the Petition. Judge Bennett acknowledges, then, that the Petition's Statement of Facts is correct and relevant.

Judge Bennett's Opposition Brief suggests only two areas of misstatement. First, Judge Bennett states that Mr. Hilliard's "public statements" to the "media" bely his protestations of innocence. (BIO at 2-3.) Yet, Mr. Hilliard put this issue squarely before this Court in the text (as opposed to mere appendix) of his Petition. (Petition at 11 ("Aside from what Mr. Hilliard already had told the media – namely, that he filed in this manner in order to land one of his cases in a particular court, before a

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[1] Mr. Hilliard uses the same abbreviations and shorthand references he used in his Petition.

particular judge – he asserted the attorney-client privilege as to Judge Bennett's questions (asked, as they were, before opposing counsel).")) Mr. Hilliard brought his media statements directly to the Court's attention – he did not "protest innocence" and hide these statements from the Court.

Second, Judge Bennett describes as "inexplicable" Mr. Hilliard's position that he committed no *actus reus* in violation of any rule or law. (BIO at 11 n.6.) Yet Judge Bennett cannot identify a single rule or law that renders punishable Mr. Hilliard's conduct. In fact, the one rule or law he discusses – Rule 13 of the Texas Rules of Civil Procedure: (1) neither mentions nor describes Mr. Hilliard's conduct; and (2) was unmentioned in the Show Cause Order. (*See* Petition at 13 n.12; *compare* App. 80-81 [Show Cause Order – no mention of Rule 13] *with* App. 105 [Sanction Order – reliance on Rule 13].)

Mr. Hilliard's "claim" of "innocence" is not inexplicable; rather, what is inexplicable is Judge Bennett's continued inability to identify what law Mr. Hilliard allegedly broke. Mr. Hilliard has stated from the beginning that he filed the cases in the manner he did, intentionally, and with his clients' best interests in mind. He never caused – or even suggested to – anyone in the Nueces County clerk's office that they should file or handle his cases other than in accordance with Nueces County District Court Local Rules. At worst, then, Mr. Hilliard thought about and wanted to "forum-shop." This is the heinous crime that Judge Bennett contends merits a $10,000 fine.[2]

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[2] As an aside, Judge Bennett appears to be offended by the phrase "forum-shop" because it connotes to him the idea that a

In short, Judge Bennett's Opposition Brief concedes the correct and fully supported statement of the facts provided by Mr. Hilliard's Petition. Judge Bennett's failure to identify one "mischaracterization" of the record is not due to oversight on his part. Mr. Hilliard correctly and fully has presented to the Court the factual nature of the proceedings below.

B. Mr. Hilliard Presents Properly Preserved Error to This Court for Review.

1. The Parties Litigated Whether Judge Bennett Could Sit as a Judge in a Case in Which He Also Served as Investigator, Accuser, Prosecutor, and Award Beneficiary.

Judge Bennett contends that the issue of whether he sat as "investigator, complainant, prosecutor, trier of fact, judge, and beneficiary of award" is not properly before

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litigant perceives one court as preferable to another. Judge Bennett cannot articulate any reason for why this is a sanctionable belief. If it is Judge Bennett's position that all courts are, in fact, fair, then forum-shopping exists in a vacuum – no benefit or harm can accrue as a result of forum-shopping in a system in which all judges are fair. If Judge Bennett's position is that Mr. Hilliard filed "frivolous" lawsuits (with their concomitant burden on the legal system), the record contains no evidence of this. Mr. Hilliard correctly asserted his attorney-client privilege and declined to discuss how he intended to handle his cases, before defense counsel, at such an early stage of the litigation. Finally, if Judge Bennett's position is that Mr. Hilliard's conduct violated the Nueces County District Court filing procedures, the record makes clear that the Nueces County District Court Clerk filed all of the cases in accordance with the county's Local Rules. (App. 38-46.)

the Court. (BIO at 9-10.)[3] Accordingly, Judge Bennett concedes that he, in fact, did wear all these hats. His only argument is that Mr. Hilliard "waived" this matter for review by not "objecting." (*Id.*)

As an initial matter, it is not at all clear that such error is "waivable" (as opposed to being so fundamentally wrong as to allow for review by appellate courts even in the absence of proper objection). *See United States v. Neal*, 101 F.3d 993, 996 & 999-1000 (4th Cir. 1996) (holding that, in a case in which a judge sits as complainant and prosecutor, such error is "plain error" requiring reversal, even in the absence of proper objection). Putting aside this question, however, Mr. Hilliard has provided this Court with a record replete with objections.

Indeed, the sole item Judge Bennett provides in his appendix *reflects* Mr. Hilliard's precise objection on this issue. (BIO App. at 22-26; *see also* BIO at 7 (admitting that Mr. Hilliard objected to Judge Bennett sitting as judge on a "separation of powers" basis).) *Cf. United States v. Neal*, 101 F.3d at 999 (in case in which "the district judge investigated the incriminating facts through extrajudicial

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[3] Judge Bennett "objects" to Mr. Hilliard's depiction of him as the "beneficiary of award." (*See, e.g.*, BIO at 9 n.4.) Mr. Hilliard attaches a copy of Judge Bennett's clerk's receipt (reflecting the 319th District Court's clerk's signature) for Mr. Hilliard's check in the amount of $10,000 as "Appendix P." Judge Bennett certainly *did* receive the benefit of the $10,000 award – albeit while wearing his "court" hat. As for Judge Bennett's claim to this Court that the $10,000 is "trivial" (BIO at 10 n.5), such an extraordinary statement underscores the inappropriateness of Judge Bennett's sitting in this matter as accuser, adversary, and adjudicator.

means, introduced evidence against Neal, and otherwise presented the Government's case, he improperly assumed a prosecutorial role . . . ," holding that such conduct violated "separation of powers" doctrine).

While it is true that Mr. Hilliard's objections to Judge Bennett's power to adjudicate at the "show cause" hearing were not as artfully articulated as appellate practitioners might desire, it is nonetheless a fact that in his Reply to Show Cause Order, Mr. Hilliard objected to Judge Bennett's:

(i) lack of jurisdiction;

(ii) violation of federal constitutional rights (due process);

(iii) lack of proper notice; and

(iv) lack of authority to sanction, under the circumstances.

(App. at 91-93 [lack of jurisdiction], 93-94 [due process {focusing on lack of notice but raising global due process issues}], 94-95 [ambiguity of order {failure to identify conduct in violation of rule or statute}], and 95-97 [lack of authority to act in such a sweeping exercise of punitive power].)

The fact that Judge Bennett admits the impropriety of *his* conduct (*viz.*, wearing at least five different hats at one hearing) but denies the sufficiency of Mr. Hilliard's objections is, perhaps, the best evidence for why this Court should grant *certiorari* here: to spell out what is intuitively obvious – while a trial court *does have* authority to sanction conduct both before and outside of its

presence, it *does not have* authority to wear every hat in our three-part, governmental system.

And, in any event, even if all this were not enough to preserve error, the parties litigated the precise issue of the federal, constitutional, due process scope of Judge Bennett's authority before both the Corpus Christi Court of Appeals and the Texas Supreme Court. Indeed, the Corpus Christi Court of Appeals wrote on this precise topic, observing:

> If the jurisdictional shortcomings are overlooked, serious due process concerns are implicated. Even if the relators had nonsuited the underlying lawsuit and the respondent could demonstrate that he was acting within his inherent power to sanction,[ ] he did not have the authority to be both accuser and adversary to the relators on the one hand, while remaining the ultimate judge of their conduct on the other.

(App. at 138 [Court of Appeals' Opinion] (footnote omitted).) As this Court has held repeatedly, a party is not barred by failure to cite the proper constitutional provisions when the lower courts consider the relevant provisions. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 217 n.3 (1968) (and cases cited therein), and *Gibbs v. Burke*, 337 U.S. 773, 779 (1949) ("The federal question was adequately if inartistically raised in the petition for a writ of habeas corpus."). Here, the lower court did not merely "consider the relevant provisions" of the federal constitution, it *held* the federal constitution barred Judge Bennett from sitting as accuser, adversary, and adjudicator. Likewise, the Texas Supreme Court considered and rejected Mr. Hilliard's arguments. (App. at 11-13.)

In short, Judge Bennett's claims to this Court that it ought not countenance Mr. Hilliard's "appellate ambush" thus are disingenuous. (*See* BIO at 11.) As a judge and as a party, Judge Bennett has been well aware of all of the issues raised herein since this case's inception. His protestations to the contrary are simply more evidence of why the Court should grant review by *certiorari*: if a sitting judge cannot understand a party's objection to his conducting a legal proceeding as complainant, prosecutor, and judge, this Court should provide explicit guidance to protect the Constitution.

2. The Burden of Proof Is a Question of Law – the Law Does Not Require a Defendant to Apprise His Prosecutor of the State's Evidentiary Standards.

Judge Bennett complains that Mr. Hilliard has "waived" the "beyond reasonable doubt" standard of proof applicable to his case. (BIO at 10.) In particular, Judge Bennett claims that Mr. Hilliard did not bring to his attention the fact that (1) the proceeding was one of "criminal contempt," as opposed to "civil contempt"; and (2) the law required Judge Bennett to prove his case "beyond reasonable doubt."

As to the first issue, Judge Bennett's trial level determination that the proceeding was one of "civil" and not "criminal" contempt is simply not determinative, nor is Mr. Hilliard's purported failure to tell Judge Bennett what kind of proceeding was occurring. *See, e.g., International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 838-39 (1994) ("civil v. criminal" distinction is

one of law when judge, as opposed to legislature, makes the decision), *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1401 (6th Cir. 1991) (rejecting precise argument raised by Judge Bennett, namely, that failure to object to civil v. criminal distinction waives issue for review on appeal), *Buffington v. Baltimore County, Maryland*, 913 F.2d 113, 133 (4th Cir. 1990) ("A district court's description of a contempt sanction as either civil or criminal is not determinative and must be scrutinized independently by the appellate court."), *cert. denied*, 499 U.S. 906 (1991), and *TWM Mfg. v. Dura Corp.*, 772 F.2d 1261, 1270 n.8 (6th Cir. 1983), *cert. denied*, 479 U.S. 852 (1986); *see also New York State Nat'l Org. for Women v. Terry*, 41 F.3d 794, 796-97 (2d Cir. 1994) (*per curiam*) (analyzing whether case involved civil or criminal sanctions).

As to the second issue, it is perhaps because Judge Bennett is a *judge* and not a *prosecutor* that he was unfamiliar with his burden of proof – it being, in criminal contempt cases, the "beyond reasonable doubt" standard. If so, this underscores the impropriety of his conduct. Regardless, however, of whether Judge Bennett should have been aware of the correct standard of proof, a defendant is not required to inform his prosecutor of the state's burden of proof. Judge Bennett's failure to cite a single case to the contrary underscores the obvious weakness of his position. (*See* BIO at 10-11.)

C. Review on Petition for Writ of Certiorari Is Appropriate.

The remainder of Judge Bennett's Opposition Brief contends that this case is not worthy of review by *certiorari*. (BIO at 11-15.) Mr. Hilliard respectfully contends to the contrary. Few matters merit this Court's attention so much as naked disregard, not for the physical document of the Constitution, but, instead, for the values the Constitution embodies.

The founding fathers drafted the Constitution with an eye towards the end of tyranny. The particular tyranny at issue came in the form of a political system that left unfettered one individual – for example, a king – by any "due process" system that would protect individual citizens.

If Judge Bennett did not know that the Federal Constitution prevented him from sitting as an investigator, complainant, prosecutor, trier of fact, judge, and recipient of award in one case, and if the Texas Supreme Court also does not know this to be the case, then surely this Court needs to make crystal clear to all representatives of state court judiciaries that such is, in fact, the law in America for all courts, not just federal courts.

In *United States v. Neal*, 101 F.3d at 993, the Fourth Circuit observed, "At the time of Neal's hearing, the settled law of the Supreme Court was abundantly clear that the simultaneous assumption of inconsistent roles of prosecutor and judge transgresses our most fundamental notions of procedural fairness." *Id.* at 998. The Fourth Circuit, however, was addressing the conduct of a federal district court. Mr. Hilliard respectfully submits that this

Court should grant a writ of *certiorari* and make "abundantly clear" that the same rule obtains in the judiciary systems of the states.

CONCLUSION

As Alexander Hamilton once observed, liberty has nothing to fear from a judiciary isolated from the executive and legislative branches, but "would have everything to fear from its union with either of the other departments. . . . " *See id.* at 999 (quoting *The Federalist No. 78*, at 491 (Alexander Hamilton) (Benjamin F. Wright ed., 1961)). Mr. Hilliard petitions the Court to grant a writ of *certiorari*.

Respectfully submitted,

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March 13, 1998

Re: Cause No. 95-4900-G; Cause No. 13-96-042-CV; and Cause No. 96-0598

Today the 13th day of March, 1998, I have received check number 8135 in the amount of $10,000.00 from Robert C. Hilliard, P.C.

/s/ Lillian Fanning
319TH DISTRICT COURT
NUECES COUNTY, TEXAS